Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRANK MCDANIELS

Petitioner,

against

JAMES R. FLICK; JOHN M.FITZPATRICK; FRANK C..HESS, JR.; JAMES P.GAFFNEY; JOSEPH W. GATTINELLA; NANCY J. GILOLEY; DEE M. GRANT; SHARON KREITZBERG; JAMES J. McCANN; BARBARA W. MOSS; ALBERT T. OLENZAK; LUTHER H. SMITH; ROBERT E. WELSH; DELAWARE COUNTY COMMUNITY COLLEGE

DELAWARE COUNTY COMMUNITY COLLEGE

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Third Circuit

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Questions Presented For Review

1. Is due process under the Fourteenth Amendment satisfied by a pretermination "hearing" where, in accordance with an official policy that the more serious the charge the less advance notice and specifics,:

(a) a tenured college professor is called to a meeting which he thought was of no consequence and ambushed with accusations of purported sexual harassment occurring six months earlier, accusations of which he had no knowledge before the meeting,

(b) the professor is denied access to the document containing the specification of the charges and only given disjointed snippets of information,

(c) the professor is exiled from campus at the conclusion of the meeting and denied any opportunity for further meetings with the college administrators or the college board, and,

(d) the professor is terminated by the college board in a fifteen minute meeting, in which the board acts blindly on the recommendation of the administrators, without any knowledge of the specifics of purported misconduct or the professor's side of the story?

Answered "Yes" by the majority in a split panel decision below.

2. Should board member defendants be dismissed pre-trial under the above circumstances because they merely acted on advice of the administrators?

Answered "Yes" by the district court. Not answered below.

3. Does a claim that a pretermination hearing is a sham whose outcome is predetermined for reasons that have nothing to do with the accusations of purported misconduct state a cause of action under 42 U.S.C. Section 1983 of the Civil Rights Act under the above circumstances?

Answered "No" by the panel majority below.

4. Do the societal interests of insuring quality education require enhanced pretermination procedure under the above circumstances where the student's complaint of purported sexual harassment first surfaces in the context of a grade dispute and is about incidents occurring six months earlier?

Answered "No" by the panel majority below.

5. May a court of appeals overrule a properly instructed jury which, after considering the evidence, renders the verdict that the pretermination procedure did not allow the professor a meaningful opportunity to be heard in defense?

Answered "Yes" by the panel majority

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PETITIONER FRANK MCDANIELS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Frank McDaniels, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, rendered in these proceedings on July 11, 1995

Reports of Opinions Delivered in the Courts Below

The United States District Court for the Eastern District of Pennsylvania issued an unreported opinion on November 18, 1994 (51a)[1] in support of its August 19, 1994 order entered August 22 (67a), which denied the parties post-trial motions including a motion by respondent under Rule 50 (b), F.R.Civ P., for judgment as a matter of law.

The United States Court of Appeals for the Third Circuit reversed the district court denial of respondent's post-trial motion for judgment as a matter of law under Rule 50 (b), F.R.Civ. P., and directed judgment for respondent, in an opinion issued July 11, 1995, McDaniels v. Flick,et al., 48 F.3d 719 (3d Cir. 1995) (3a).

Statement of Jurisdiction

The Court of Appeals filed its

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[1] -a refers to page number in the appendix which follows the petition.

opinion and entered judgment on July 11, 1995 (3a, 48a). The Court of Appeals entered an order denying petitioner's timely request for rehearing on August 22, 1995 (1a). On November 14, 1995, Justice Souter granted petitioner's request for an extension of time to petition for certiorari and extended the time to December 20, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under Title 28 U.S.C. Section 1254 (1) granting jurisdiction to this Court to review by writ of certiorari cases in the Courts of Appeals, upon petition of any party.

Constitutional Amendment Involved

This case involves the pretermination due process entitlement of a tenured professor at a state educational institution under the Fourteenth Amendment To the Constitution which provides in material part:

> ".....nor shall any State deprive any person of life, liberty, or property, without due process of law....."

Statement of the Case

1. Nature and History of the Case

This case filed February 13, 1992, is a civil rights action under 42 U.S.C. Section 1983 brought by petitioner, Professor Frank McDaniels ("Professor"), against Delaware County Community College ("College") and members of its Board of

Trustees ("Board") who voted to terminate his employment. The action asserts that the Professor, who was tenured at the College with about twenty years service, was terminated without due process in violation of the Fourteenth Amendment to the United States Constitution. The action seeks reinstatement, compensatory damages against the College and its Board members in their official capacities, punitive damages against the Board members in their individual capacities, and attorneys fees.

On June 27, 1994, the district court dismissed the individual defendants finding that they were not liable for punitive damages as a matter of law because they relied on the administrators in voting to discharge the Professor.

A trifurcated Jury trial lasting sixteen days began on June 20, 1994. On June 23, 1994, the jury reached the verdict that the Professor was denied pretermination due process because he was not given a meaningful opportunity to respond and tell his side of the story.

On July 13, 1994, the jury reached the verdict that the Professor would not have been terminated if he had been given pretermination due process. On July 18, 1994, the district judge issued an order in accordance with the jury verdict, that the Professor be reinstated with an award of backpay and benefits in the agreed amount of $134,081. Trial then proceeded on emotional distress and other non-economic damages resulting from the

Professor's wrongful termination and the jury returned a verdict finding no non-economic damages. On July 20, 1994, judgment was entered awarding the Professor an additional one dollar nominal damages for the Constitutional violation.

The College and the Professor each filed timely post-trial motions. The College contended it was entitled to judgment as a matter of law on the issue of the adequacy of pretermination due process. The Professor contended, inter alia, that the district court erred in dismissing the Board members as defendants and in failing to grant a new trial on non-economic damages only because of prejudicial remarks by College counsel. The district court issued an order on August 19, 1995, entered 8/22/95, denying the parties respective post-trial motions (67a). On November 18, 1995 the district court issued an unpublished opinion in support of this order (51a).

The College filed notice of appeal to the United States Third Circuit Court of Appeals on September 7, 1994. The Professor filed notice of cross-appeal on September 19, 1994, raising the issue of the validity of the dismissal of the Board member defendants and the denial of a new trial on non-economic damages.

On July 11, 1995, a panel of that court comprised of Judges Greenberg, Roth, and Aldisert filed a split decision (3a). McDaniels v. Flick, et al. 59

F.3rd 446 (3d Cir. 1995). Judge Greenberg, joined by Judge Roth, held that the district court erred in not granting the College motion for judgment as a matter of law because the jury finding that the Professor was not given a meaningful opportunity to respond and tell his side of the story, "is not supported by legally sufficient evidence" (21a). McDaniels, 59 F.3rd 453. The majority directed the district court to enter final judgment against the Professor. Judge Aldisert dissented, finding that the pretermination procedure did not accord the Professor fundamental fairness (46a). McDaniels, 59 F.3rd 461. The majority opinion also held that the Professor was precluded from proceeding under Section 1983 of the Civil Rights Act on his alternate theory of liability that the pretermination hearing was a sham whose outcome was predetermined for reasons that had nothing to do with the purported charges (36a). McDaniels, 59 F.3rd 458.

2. Facts

On November 27, 1991, the Wednesday before the Thanksgiving holiday, Frank McDaniels, then Professor of business and chairperson of business management, small business management and retail management, with over twenty years of service to the College, learned by telephone about noon that he should go to the office of personnel director James Bryan at 2:30 p.m. The Professor was then involved with the myriad demands of the close of the fall semester including

finals for his 200 students two weeks away, sixty term papers due to be graded, and, in addition, dealing with the needs of his fifty advisees.

When the Professor entered Mr. Bryan's office he found him seated with Thomas McNicholas, then Dean of Arts & Sciences. Mr. Bryan started the meeting by telling the Professor that he was recommending his dismissal to the Board because a student made a charge of sexual harassment against him. Up to this time the Professor had no knowledge about any outstanding complaint of sexual harassment or that the meeting would be about any complaint of sexual harassment.

The purported sexual harassment to be discussed at the November 27, 1991, meeting involved incidents that took place about six months earlier during the summer College term, sometime between May 15, 1991 and June 26, 1991, involving a former student named John Federici. Federici had spent five years at another college without completing his degree requirements. He had taken the Professor's summer course with the objective of receiving at least the grade of "C" which was required for the course to be credited toward completion of his degree requirements. The charges of sexual harassment first surfaced in the context of a grade dispute after the Professor refused to change Frderici's grade of incomplete above a "D" because of his failure to complete course work and submitting his term paper a month late.

Federici threatened to "get" the Professor when he refused his demand for a "C". Federici then took the grade dispute to the Professor's supervising Dean who told him he should resolve it with the Professor. When Federici said he could not return to the Professor he welcomed the Dean's suggestion of sexual harassment and went to personnel director James Bryan who handled such complaints. Bryan met with Federici for about fourty-five minutes and prepared a three-page handwritten document containing isolated snippets not in any chronological sequence which he viewed as the essence of Federici's complaint. The College then proceeded on Bryan's "essence" notes as a formal complaint of sexual harassment by Federici. The isolated snippets in Bryan's notes all involved incidents on campus, including incidents in the college library where the Professor purportedly looked at the lower part of Federici's body, and woke him by massaging his neck and an incident in the Professor's office where the Professor allegedly discussed tough love counselling and said "that he would help [Federici] and if I need to I will hug you, beat the crap out of you or put my penis in your mouth"

The short notice and absence of information about the pretermination meeting were deliberate acts of the College administrators in accordance with their policy that the more serious the charges, the shorter the notice and the less information given the accused before the meeting. Bryan said he knew it was

possible that if somebody was surprised with a serious accusation he might not be able to respond, and that it was certainly possible that a person would become so emotionally distraught at learning he was going to be dismissed after twenty years that he could not gather his thoughts to respond

In fact, the Professor felt like a lightning bolt had struck him when he was surprised with the accusations. He was confused, shocked and dismayed and failed to comprehend what was happening. Within about twenty minutes of the start of the meeting he was further overwhelmed and devastated when he learned that Federici was the complaining student. He had made every effort to assist Federici to pass his course including giving him an incomplete so he could have more time to complete his course-work when Federici's emotional problems interfered with his studies.

The Professor was never shown Bryan's "essence" notes that the College deemed Federici's complaint. Bryan asked in a confusing manner without any chronological connection whether he had touched Federici in the library, discussed tough love, or looked at the lower part of his body. There was no discussion during the meeting about any accusation involving a purported discussion about a penis in somebody's mouth. The Professor did not understand from the limited information Bryan provided how any of it constituted sexual harassment. He was never given any

statement in context about what Federici said.

During the meeting Bryan brought up that the Professor signed a letter of reprimand over a year earlier, in August 1990, because of earlier purported student complaints of sexual harassment. Bryan did not discuss the specifics of the earlier student complaints. The Professor had signed the letter without admitting any guilt and without ever seeing the written statements of the students or any other documents that were the basis of the purported complaints against him. He responded to the fragments of information the administrators supplied him about these previous complaints. He agreed to sign the August 1990 letter, because of fear that contesting the charges would result in publicity that would cause him to lose his leadership role in local youth ice hockey organizations, an important part of his life. A fellow teacher had been destroyed by sexual harassment charges. He considered the earlier complaints as explained to him to be frivolous and ridiculous. The Professor thought there was minimal risk in signing the letter under the circumstances.

At the conclusion of the meeting the Professor was told to leave campus speedily. He knew fragments of information but not what the complaint was really about.

When the Professor went home and was able to gather his thoughts he created a

written chronology detailing all his meetings with Federici. He would not have been able to put the chronology together at the meeting with Bryan because of his state of shock and surprise. He then received a letter from Bryan dated December 9, 1991 saying he could appeal to the College president, Richard DiCosmo. On December 12, 1991, he wrote president DiCosmo requesting, among other things, a meeting to go over the chronology of his contacts with Federici. The president replied in a letter dated December 18, 1991, denying his request for a meeting and informing him that the matter of his dismissal would be presented to the Board at its meeting that same evening. This effectively denied the Professor his right under Step Three of the College Sexual Harassment Policy complaint procedure to seek further pretermination review by appeal to the Board within five days of the decision of the president. The policy provided that on appeal, the Board chairman:

> "shall appoint an appropriate committee to review and investigate the matter, and the Board of Trustees shall issue a decision within fifteen days of receipt of the appeal".

The Board terminated the professor's employment without hearing on December 18, 1991. The stated cause for dismissal was conduct described in reports to the College dated March 27, 1990 and March 28, 1990, and November 18, 1991. As of

the December 18, 1991, Board meeting, the College had not supplied the professor with copies of the March 27, 1990, or March 28, 1990 or November 18, 1991 reports that set forth the conduct specified as cause for dismissal to the Board. The content of the two 1990 reports was not discussed during the November 27, 1991 meeting with Messrs. Bryan and McNicholas.

The Board did not know the professor's side of the story when it terminated him. The Board had not heard a word from the professor directly. The Board received no report from anyone concerning the professor's side of the story.

The Board was intentionally not allowed to see any of the reports that were the stated cause for dismissal of the professor or to receive any summary of their content. The Board was told that the College administrators carried out a thorough investigation and recommended termination.

3. Opinions Below

a. Decision of District Court

In an unreported decision issued November 18, 1994 (51a), the district court, inter alia, denied the College Rule 50 (b) motion asking judgment as a matter of law that the Professor was afforded a constitutionally adequate opportunity to respond to the charges against him. In denying the College

motion the court held that the evidence presented the triable question whether the pretermination procedure accorded the Professor met constitutional requisites (56a-58a).

b. Decision of Court of Appeals

The panel majority held:

(1) That the College should have been granted judgment as a matter of law because the jury verdict that the Professor did not have a meaningful opportunity to respond "is not supported by legally sufficient evidence" (21a). McDaniels, 59 F.3d 453.

(2) That the Professor was precluded from pursuing his alternate theory of liability under 42 U.S.C. Section 1983, that the pretermination proceedings were a sham whose outcome was predetermined for reasons that had nothing to do with the purported charges of sexual harassment (36a). McDaniels, 59 F.3d 458.

The panel minority member dissented on holding (1), and did not address holding (2). He found that the fundamental fairness required by due process was not accorded Professor McDaniels:

> "Subsumed in the due process requirement of notice is the concept that the recipient will be afforded some opportunity to prepare a meaningful defense.

> In this case the fact that the notice of the pretermination meeting was given, as found by a jury, was nevertheless insufficient to permit Professor McDaniels to defend against a serious charge of sexual harassment intentionally flung upon him out of the blue, as also found by the jury. Under my view of due process protection, notice of a meeting is meaningless unless the vulnerable party is permitted a realistic opportunity to mount a defense and respond accordingly."

50a; McDaniels, 59 F.3rd 463

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Court of Appeals decided important federal questions in conflict with applicable decisions of this Court on due process requisites before governmental deprivation of property rights.

   (a) The Complete Insulation of the Decision-Making Board From Knowledge of the Specifics of the charges or the Professor's Side of the Story Violates Due Process

This case involves unique circumstances. The Board who terminated the Professor knew nothing of his side of the story because they were deliberately insulated from the facts, and the Professor had no opportunity, much less a meaningful one, to be heard by these decision-makers.

The Board terminated the Professor without any knowledge of the specifics of the charges against him or his side of the story. The Board's consideration of the Professor's termination lasted about fifteen minutes. The Board members were deliberately denied any information about the specifics of the charges or the Professor's side of the story.

But, an essential requisite of pre-termination due process is the opportunity to influence the decision-maker about the gravity of the penalty before the penalty is determined.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Loudermill was decided in the context of the termination of a security guard and a school bus driver, both local government employees. The factual basis for the respective terminations, failure to disclose conviction of a felony on the employment application and failure to pass an eye exam, were not disputed, and both employees had extensive post-deprivation review rights under civil service. In this context this Court held that due process requires opportunity to address the discretion of the decision-maker about what the penalty should be before it is determined. "Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination decision takes effect." Loudermill, at 543.

Here, there was a total violation of Loudermill's mandate, by the deliberate insulation of the decision-making Board from any information about the Professor's side of the story or the specifics of the charges. There was no connection between anything the Professor said and the Board action because of this.

Due process under the Fourteenth Amendment also requires that the authority having final responsibility to determine a property deprivation consider

and appraise the evidence. At a minimum, this requires reading a summary or analysis prepared by subordinates. The decision-makers must have a personal understanding of the evidence. Morgan v. United States, 298 U.S. 468, 481-482 (1936); Bates v. Sponberg, 547 F.2d 325, 332 (6th Cir. 1976). Wexley v. Michigan State University, 821 F. Supp. 479, 483-484 (W.D.Mich. 1993), aff'd 25 F.3d 1052 (6th Cir. 1994). Martin v. Guillot, 875 F.2d 839, 841-845 (11th Cir. 1989), involved trustees who terminated a tenured member of a state university's administrative staff and were later compelled by court order to read the transcript of the due process committee's hearing and to certify compliance by affidavit. 875 F.2d at 842.

(b) The opinion departs radically from this Court's teaching on pre-deprivation due process

The majority interprets Loudermill, supra, in a narrow mechanistic manner, as if it were an amendment to the Due Process Clause, providing a scriptural solution for every public employee termination, regardless of the interests involved. This approach is contrary to Loudermill, which, like many cases before and after, requires a balancing of interests depending on the circumstances.

As discussed, Loudermill arose in the context of employment termination cases where the facts supporting discharge were undisputed. In that context Loudermill held that Due Process

requires pre-deprivation procedure adequate to provide a check on mistaken decision-making and to allow the accused to address the discretion of the decision-maker about the scope of the penalty before the penalty takes effect. Loudermill did not attempt to quantify the required measure of due process, but like this Court's cases before and after, recognized that due process was a flexible concept whose precise determination involved a balancing of the interests involved and the circumstances. Brock v. Roadway Express, 481 U.S. 250 (1987); Mathews v. Eldridge, 96 S.Ct. 893, 903 (1976). Mathews states the factors to be considered in deciding what process is due predeprivation of protected interests (903): (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards, and, (3) the Government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.

The private interest that was to be affected by the College action was the livelihood of a twenty year veteran professor whose career and future earning ability would be entirely destroyed by termination on the basis of charges of sexual harassment. The risk of erroneous deprivation through the procedure the College used was high. The Professor was

called to the November 27 meeting when he was focused on the myriad demands of the close of the fall semester including preparing finals for his 200 students and sixty term papers due to be graded, and then ambushed with extremely serious accusations with no advance notice or opportunity to marshall thoughts about activities that had taken place almost six months earlier. Bryan, who conducted the meeting, said he knew it was possible that somebody surprised with a serious accusation might not be able to respond.

The unreliability of the accusations also required heightened procedure as a check against mistake. They first surfaced in mid October 1991, in the context of a grade dispute, about purported incidents of sexual harassment occurring about six months earlier. They were made by a 24-year-old student, previously unknown to the administrators, who was insistently seeking a grade of "C" in the Professor's course necessary for transfer to complete his degree requirements at another college.

There was no legitimate governmental interest served by the College pretermination procedure, which was based on the College policy that the more serious the charges the less the advance notice and information to be given the accused. The substantial governmental interest in having teachers free to teach and to grade appropriately free of fear of student reprisal again requires heightened pretermination procedure.

The interest involved in termination of a tenured professor is academic freedom, the raison d'etre of tenure. R. Brown & J. Kurland, Academic Tenure and Academic Freedom, Law and Contemporary Problems, Vol 53., No. 3 (Summer 1990), at 333. Officials of the American Association of University Professors report that charges of sexual harassment are now the most frequent cause of stripping tenure. Brown & Jordan, supra, note 118, at 345. Academic freedom and stripping of tenure based on charges of sexual harassment are weighty interests tipping in favor of heightened due process to tenured faculty members.

Holley v. Seminole County School District, 755 F.2d 1492 (11th Cir. 1985), was decided six days after Loudermill. Holley, at 1496-97, restated the Eleventh Circuit's four-part pre-termination requirements of federal due process in situations where a teacher who is to be terminated for cause opposes his termination. Rehearing was denied on June 12, 1985, almost three months after Loudermill. Holley did not even mention Loudermill, much less hold that it attenuated existing requirements in faculty cases.[2] The Eleventh Circuit

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[2] The Eleventh Circuit requires: "...that the teacher be given (1) notice of the reasons for dismissal; (2) notice of the names of adverse witnesses and the nature of their testimony; (3) a meaningful opportunity to be heard; and (4) the right to be heard by a tribunal

adhered to its four-part Ferguson/Holley requirements in Martin v. Guillot, 875 F.2d 839, 844 (11th Cir. 1989).

(c) A sham pretermination hearing is actionable

The majority holds that a claim of a sham pretermination hearing, whose outcome is predetermined for reasons that have nothing to do with the purported charges, can not be brought under the Civil Rights Act, 42 U.S.C. Section 1983.

The panel majority, framing the claim as one of denial of an impartial tribunal, reasons: (i) that the constitutional violation is not complete until the state fails to provide a remedy and the Professor had a right of appeal under the Local Agency Act, 2 Pa. C.S.A Sections 752 & 754 and the right to post-termination arbitration under the Union grievance procedure[3], and, (ii) that the doctrine of Parrett v. Taylor, 451 U.S. 527 (1981), precluding civil rights claims against employers arising out of random, uncontrollable acts of their employees bars this action.

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which possesses some academic expertise and an apparent impartiality toward the charges leveled against the teacher..."

[3] If there were any need to exhaust state remedies, this case should be stayed, not dismissed by adverse judgment.

But, the teaching of Loudermill, supra, is that pretermination due process requires at a minimum the right to influence the decision-maker about the gravity of the penalty before the penalty takes effect. If the outcome of the predeprivation hearing is predetermined, due process is denied. This is a different issue from whether the decision-maker is impartial. A decision-maker may be prejudiced, but retain the ability to listen and be influenced and change his decision when he hears the accused's side of the story. If the outcome is predetermined, nothing the employee says can affect it.

Parrett v Taylor, supra, is also no barrier here. This case does not involve random, unforeseeable action by low level employees in violation of organizational safeguards or controls. The Professor alleges the sham pretermination proceedings were orchestrated by the president and other high level administrators. Given the College policy of the more serious the charge the less advance notice and specifics given the accused, and the Board's willingness to act blindly as a rubber stamp for the administrators, sham pretermination proceedings at the College are entirely foreseeable.

2. The opinion below nullifies the verdict of a properly instructed jury supported by ample evidence.

In holding that the jury verdict that Professor McDaniel's was not given a

meaningful opportunity to respond and tell his side of the story "is not supported by legally adequate evidence", the panel majority usurps the jury function and draws its own key conclusion that the pretermination hearing opportunity lasted from the November 27, 1991 meeting up to the time the Board voted to terminate the Professor on December 18, 1991, which provided "ample time [for the Professor] to collect himself" (33a). McDaniels, 59 F.3d 457.

The jury heard 386 pages of testimony including 104 pages by the Professor in the first phase of trial on the issue of pretermination due process. The district judge then instructed the jury to answer three questions: (1) Did defendant...through James Bryan...notify plaintiff ... that the meeting on November 27, 1991, was a pretermination hearing based on the sexual harassment charges of John Federici? (2) At the meeting did James Bryan inform plaintiff as to the substance of the case against him? (3) Was plaintiff...given a meaningful opportunity to respond and tell his side of the story? The district judge instructed the jury that if it answered "No" to any of the three questions that plaintiff won that phase of the case. The jury then answered "Yes" to questions one and two and "No" to question three.

The jury was free to reject any testimony based on its own assessment of credibility and to draw its own factual conclusions from its perception of the

testimony. The district judge specifically instructed that in deciding whether the Professor had opportunity to respond, the jury might consider "what occurred at the meeting on November 27, 1991, and also what occurred thereafter, prior to his termination on December 18". There was ample basis for the jury to conclude that the pre-termination hearing ended on November 27 with no further real opportunity to respond and that the circumstances of the November 27 meeting did not provide meaningful opportunity to respond.

The panel majority weaves its own tapestry from the factual matrix treating the College testimony as undisputed gospel to support its key conclusion that the pretermination hearing opportunity continued from the end of the November 27 meeting until the Board termination on December 18. But, the only undisputed facts were that the Professor received a letter from Bryan dated December 9, 1991 saying he could appeal to the College president, Richard DiCosmo, that on December 12, 1991, he wrote president DiCosmo requesting, among other things, a meeting to go over the chronology of his contacts with Federici and that DiCosmo replied in a letter dated December 18, 1991, denying his request for a meeting and informing him that the matter of his dismissal would be presented to the Board at its meeting that same evening. The panel majority enriches these facts by accepting the College testimony about various purported investigations carried out after the November 27 meeting and by

DiCosmo in response to McDaniel's letter, to support its key conclusion about the duration of the pretermination hearing opportunity (17a-19a). McDaniels, 59 F.3d 452-453.

In substituting its own factual viewpoint for that of the jury the panel majority intrudes impermissibly into the jury's function in violation of the prohibition of the Seventh Amendment to the Constitution. The Seventh Amendment forbids appellate judges from sitting as post-trial assessors and denies them the power to vacate awards because they might as fact-triers have decided differently. A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).

3. The Court of Appeals decision has so far departed from the accepted and usual interpretation of property deprivation safeguards under the Fourteenth Amendment as to call for this Court's power of supervision to safeguard these rights.

The panel decision effectively ends any pretermination protections afforded public employees under the Fourteenth Amendment in the Third Circuit. It validates a pretermination "hearing" where in accordance with an official policy that the more serious the charge the less advance notice and specifics, a tenured college professor was called to a meeting which he thought was of no consequence and ambushed with accusations of purported sexual harassment occurring six months earlier, accusations of which

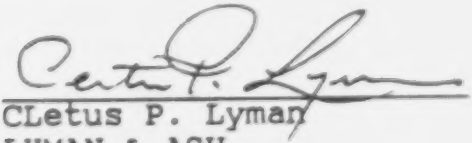
he had no knowledge before the meeting. He was denied access to the document containing the specification of the charges, given disjointed snippets of information and, at the conclusion of the meeting, he was exiled from campus and denied any opportunity for further meetings with the administrators or the college Board which terminated his employment in a fifteen minute meeting, acting blindly on the recommendation of the administrators, and without any knowledge of the specifics of the purported misconduct or the Professor's side of the story.

Unless this Court intervenes, Fourteenth Amendment safeguards against property deprivation by state action are a dead letter in the Third Circuit.

Conclusion

WHEREFORE, the petition should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1838 and 94-1935

FRANK MCDANIELS

Appellee

v.

JAMES R. FLICK; JOHN M.FITZPATRICK; FRANK C..HESS, JR.; JAMES P.GAFFNEY; JOSEPH W. GATTINELLA; NANCY J. GILOLEY; DEE M. GRANT; SHARON KREITZBERG; JAMES J. McCANN; BARBARA W. MOSS; ALBERT T. OLENZAK; LUTHER H. SMITH; ROBERT E. WELSH; DELAWARE COUNTY COMMUNITY COLLEGE

DELAWARE COUNTY COMMUNITY COLLEGE

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. CIVIL No. 92-00932)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, CIRCUIT JUDGES

The petition for rehearing filed by the appellee-cross-appellant, Frank McDaniels, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:
/s/ Morton I. Greenberg
Circuit Judge

DATED: August 22,1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1838 and 94-1935

FRANK MCDANIELS

Appellee

v.

JAMES R. FLICK; JOHN M.FITZPATRICK; FRANK C..HESS, JR.; JAMES P.GAFFNEY; JOSEPH W. GATTINELLA; NANCY J. GILOLEY; DEE M. GRANT; SHARON KREITZBERG; JAMES J. McCANN; BARBARA W. MOSS; ALBERT T. OLENZAK; LUTHER H. SMITH; ROBERT E. WELSH; DELAWARE COUNTY COMMUNITY COLLEGE

DELAWARE COUNTY COMMUNITY COLLEGE

Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 92-00932).

Argued December 15, 1994

BEFORE: GREENBERG, ROTH & ALDISERT, Circuit Judges.

(Filed: July 11, 1995;
as corrected July 14, 1995)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. PROCEDURAL BACKGROUND

This matter is before this court on appeal by Delaware County Community College from orders denying its motions for judgment as a matter of law and on a cross-appeal by Frank McDaniels from orders dismissing the trustees of the college as defendants and denying him a new trial on non-economic damages. The case arose as a result of McDaniels' discharge as a tenured professor at the college.

We describe the unusual procedural background of the case at length.[1] On February 13, 1992, McDaniels filed this action in the district court under 42 U.S.C. ^U 1983 against the college's Board of Trustees, individually and in their official capacity, and against the college. He charged that the defendants, in terminating his employment by reason

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[1] The college also appeals from the denial of pretrial motions for summary judgment. In response McDaniels contends that in view of the verdict at the trial we cannot entertain the appeal from the denial of these motions. We do not address this point, however, for our conclusion that the college was entitled to judgment as a matter of law renders it moot.

of certain serious charges of misconduct made against him by a student at the college, violated his procedural due process rights under the United States Constitution. The student later was identified as John Federici.

In March 1992, the college filed a motion for summary judgment, which the district court denied without opinion. The college then unsuccessfully moved for reconsideration. In denying that motion, the district court explained that there was an issue of material fact as to whether McDaniels received notice of the charges or the purpose of the pretermination meeting before the meeting and whether he was informed of the specific accusations during the meeting.

After discovery, both sides moved for summary judgment. The court granted partial summary judgment on liability to McDaniels and thus denied the college's motion. On January 27, 1994, it started a jury trial on damages but, after hearing McDaniels' testimony, the court determined that there was a genuine issue of fact as to whether there had been a procedural due process violation. In a subsequent memorandum opinion explaining its reasoning, the court noted that actions taken after the pretermination meeting might show that McDaniels was aware of the specific charges and that he had an opportunity to respond to them. Consequently, the court concluded that it had granted McDaniels partial summary judgment improvidently. The court therefore offered McDaniels a choice

between proceeding with the trial and proving liability as well as damages, or having the court declare a mistrial. McDaniels elected to have the court declare a mistrial. In a subsequent written opinion explaining why it had reached the foregoing conclusions, the court included a footnote stating that the trustees had been dismissed as defendants "sua sponte and without objection" because they had nothing to do with the pretermination events leading up to McDaniels' discharge.

The court divided the second trial into three separate sub-trials, which we shall call phases, with the first phase focusing on liability. At the close of McDaniel's case on this phase, which was also the close of all of the evidence as the college did not call any witnesses, both McDaniels and the college unsuccessfully moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). Then in response to specific questions, the jury returned a verdict that: (1) the college adequately notified McDaniels that the November 27, 1991 meeting was a pretermination hearing on Federici's sexual harassment charges; (2) the college informed McDaniels of the substance of the case against him during that meeting; but (3) McDaniels was not given a meaningful opportunity to respond and tell his side of the story. App. 1214-15. In view of the third finding, the college could be liable. In the second phase the jury determined that if McDaniels had been given an adequate opportunity to respond, the college would

not have terminated his employment, presuming that it would have acted fairly and reasonably. App. 2171. Based on this verdict, the court entered an order reinstating McDaniels on the faculty and awarding him $ 134,081 in lost wages. Finally, in the third phase the jury found that McDaniels was not entitled to damages for non-economic harm. The court, nevertheless, awarded him one dollar on that claim for nominal damages. App. 2333.

The college then moved for judgment as a matter of law under Fed. R. Civ. P. 50(b). McDaniels filed a "conditional" post-trial motion for a new trial on the issue of damages. In opposing the college's motion, McDaniels contended that it was estopped from moving for judgment as a matter of law because the college's attorney in his closing argument at the third phase led the jury to believe that the college agreed to "make peace" with McDaniels and make him whole. The court, though not estopping the college, denied the post-trial motions on August 22, 1994. The college then filed a notice of appeal, and McDaniels filed a notice of cross-appeal.

Thereafter, McDaniels moved in this court to dismiss the appeal and cross-appeal on the basis of the statements the college's attorney made during closing argument at the third phase. Essentially he contends, as he did in the district court, that the statements estop the college from seeking

post-trial remedies. After he filed that motion in this court, the district court issued a memorandum opinion explaining the reason for its disposition of the post-trial motions, including why it had rejected McDaniels' judicial estoppel argument. We now deny the motion to dismiss the appeal and cross-appeal as we agree with the district court that the college's attorney's comments should not estop it from pursuing post-trial remedies.

On appeal, the college argues that the district court should have granted its motions for judgment as a matter of law. McDaniels cross-appeals from the district court's dismissal of his case against the individual defendants and from the denial of his post-trial motion for a new trial on non-economic damages. We will reverse on the college's appeal from the denial of its post-trial motion for judgment, will affirm on McDaniels' cross-appeal challenging the dismissal of the trustees, and will not reach McDaniels' argument seeking a new trial on non-economic damages.

II. FACTUAL BACKGROUND

We set forth the facts, many of which are not in dispute, viewing them in a light most favorable to McDaniels.[2]

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[2] We are generous to McDaniels in so viewing the facts because the college was the verdict winner at the first phase except on the third issue.

McDaniels was a tenured professor at the college which is a public institution in Delaware County, Pennsylvania. In 1990, the college received complaints from two male students that McDaniels sexually harassed them. App. 1075-80. After investigating the reports, the college sent McDaniels a letter informing him that he had violated the school's sexual harassment policy. App. 1029-30. The letter warned McDaniels that "reoccurrence of such incidents will result in serious disciplinary action including termination of employment." App. 1030. McDaniels responded to these charges in writing and signed the college's letter to acknowledge that he had reviewed its contents. App. 1030-31, 1075-80.

In the summer of 1991, McDaniels taught a marketing class at the college. John Federici, who was one of the students in the class, had trouble with the course work and sought help from McDaniels. Due to various problems, including a final term paper that Federici handed in late, McDaniels gave him a "D" for the course.[3] App. 938. Federici needed at least a "C" in the course to transfer the credit for it toward a nearly completed degree from Pennsylvania State University. App. 746.

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[3] McDaniels first gave Federici a grade of "Incomplete." App. 935.

According to McDaniels, Federici became irate and threatened to get him. App. 1017. McDaniels reported the incident to Assistant Dean Henry Jackson, McDaniels' supervisor at the time. App. 1017.

Federici also approached Jackson and complained that he disagreed with McDaniels' grading of his term paper. App. 934-36. Jackson contacted McDaniels after learning that Federici already had confronted McDaniels about the grade. App. 936-38. McDaniels told him that the term paper was not well done. App. 938. Jackson did not read the term paper. App. 947-49. Jackson then told McDaniels that Federici apparently misunderstood and that Jackson would contact him and explain the situation to him. App. 938-39. Jackson then called Federici, but when he could not make Federici understand McDaniels' position, he told Federici to contact McDaniels directly. App. 939. Federici refused, saying something to the effect of "I can't do that." App. 939. When Jackson pressed him, Federici said that he needed to talk to Jackson about another matter. App. 939-40. Federici told him that McDaniels "always wanted to counsel [him]" and "always wanted to see [him.]" App. 940. Federici also told him that McDaniels talked to him about "tough love." App. 940-41. Jackson then asked if he was talking about sexual harassment. App. 941. Federici said he was and Jackson told him to discuss the matter with James Bryan, the college's Director of Personnel Services. App. 941.

On November 18, 1991, Federici met with Bryan. App. 736, 739. Federici told Bryan that he needed credits to transfer to Pennsylvania State University for his degree; he had problems with McDaniels' class; he was seeing a counselor regarding anxiety and stress problems; and he had been involved in various incidents with McDaniels. App. 736-47. Bryan took notes of the conversation. App. 739. Bryan asked Federici to make a written statement regarding these allegations. App. 754. When Federici said that he would need help doing so, Bryan offered to compile his notes into a written statement for Federici to sign. App. 754. After their talk, Bryan composed a summary from his notes which Federici later reviewed and signed. App. 760-61. The summary, in relevant part, reads as follow:

> While in the library studying [John Federici] fell asleep & awoke to see [Frank McDaniels] who was massaging John's neck. John was taken by surprise & felt very strange that this would have happened. After that incident, [McDaniels] came into the library more & more as if he was looking for John.
>
> John was in the library on another occasion with his friend Tom & [McDaniels] came in to talk to them. [McDaniels] seemed to keep looking at the 'lower half' of John's body while he spoke. [McDaniels] did not make eye contact with John but continued to stare

at his lower body.[4]

> John made an appointment to speak [with McDaniels] in [McDaniels'] office about the added class work to improve his grade. [McDaniels] repeatedly said he wanted to help John & counsel him. [McDaniels] asked if John had heard of tough love & John said no. With this, [McDaniels] proceed (sic) to say that he would help him & 'If I need to I will hug you, beat the crap out of you or put my penis in your mouth.' [McDaniels] reached over & put both of his hands on John's face & seemed to be about to cry & said, 'I really want to help you.' John backed away and was stunned to hear this.
>
> Summer I ended & John got an 'Incomplete' for his marketing course. He reluctantly called [McDaniels] at [the college] to attempt to get the assignments necessary to get a grade for the course. [McDaniels] returned his call & made some 'sexual innuendo' remarks. [McDaniels] made an appointment to see John on campus. John was reluctant but needed to get an assignment to remove the 'Incomplete.'

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[4] Bryan testified that Federici also told him that after McDaniels left, Federici asked Tom if he noticed the way McDaniels was staring at him, to which Tom responded negatively and laughed. App. 781.

> At the appointment [McDaniels] discussed make-up work & repeating the final exam but then went into another description of the tough love thing with another explicit reference to sexual matters. [McDaniels] said to come back to his office later if he wanted to have help on matters external to class activities but if he did not return, [McDaniels] would know John didn't want help in these personal matters. [McDaniels] also said John should not discuss this with anyone since he could loose (sic) his job. [McDaniels] said he would 'get him' if he mentioned their conversations to anyone. [McDaniels] left the clear impression that the two of them could go somewhere off-campus 'in private' to work out these personal problems (sexual overtones were clear).

App. 258-61 (testified to at app. 763).

After his meeting with Federici, Bryan verified that Federici was a student in McDaniels' marketing course. He then alerted several officials at the college about the matter. App. 768-71. In particular Bryan discussed the situation with Dean Thomas McNicholas and asked Dr. Lois Ann Craig to determine whether Federici had any record of unusual behavior. App. 771-72.

On November 27, 1991, Bryan contacted McDaniels and told him to meet him in Bryan's office at 2:30 p.m. that afternoon and to bring along his grade

book. App. 787-88. Prior to the meeting, McDaniels met Bryan and inquired about the reason for it. App. 788-90. Bryan told him only that it was about a "student problem" and he gave him no other information about the meeting. App. 788-90; 983. The meeting was held as scheduled with McNicholas, Bryan, and McDaniels present.

At the start of the meeting, Bryan told McDaniels that a student had lodged a sexual harassment complaint against him and that he and McNicholas would recommend McDaniels' termination. App. 791, 982-83. McDaniels testified that upon hearing Bryan's opening statement, he was "shocked, dismayed, . . . thrown offguard." App. 983. Bryan testified that he then told McDaniels "that the purpose of the meeting was to understand what the charge was, to have an opportunity for me to relay to him what the charges were specifically and for him to have a chance to respond." App. 791. McNicholas, the only other person at this meeting, confirmed this statement. App. 915-16. McDaniels testified that he "did not comprehend" that Bryan said explicitly that it was to be a "pretermination hearing." App. 1072. McDaniels explained, "Well, if they did say it, they said it in the same sentence whereby they said they were recommending my termination to the board of trustees. If they did say it, they had blown my mind so bad at that point, they had disorganized me -- disoriented me so much that I didn't remember them saying it, if they did say it." App. 1073. Bryan and McNicholas also

testified that Bryan told McDaniels that he could adjourn the meeting at any time. App. 862, 916.

A few minutes into the meeting, Bryan informed McDaniels that Federici filed the complaint. App. 792-93, 851, 913-14, 1014. McDaniels became very upset upon learning this and left the room. App. 851, 914, 1014-18. After trying to collect himself, he returned and "was a little bit better," but was "still in a total state of shock" and "[didn't] even know what [he] said." App. 1018. McDaniels told them that Federici had threatened earlier to "get" him. App. 794, 853. McDaniels told Bryan and McNicholas that Federici had emotional problems, Federici's parents were aware of this, and McDaniels had made Dean Jackson aware of this as well. App. 794-95, 859-60, 918. Bryan and McNicholas recalled McDaniels as having said that he knew Federici's parents and had talked to them. App. 794, 859. McDaniels testified, however, that "If I did say that, I was in panic," and that he did not know them, and meant to say that they must have known that Federici had emotional problems. App. 1025-26. Bryan and McNicholas agreed to talk to Jackson and Federici's mother. App. 865. Bryan and McNicholas also testified that McDaniels asked them if he could save his job if he agreed to seek counselling. App. 858.

During the pretermination hearing, Bryan discussed Federici's allegations but he did not read or show the written summary to McDaniels. App. 802, 1018. It

is unclear whether Bryan described Federici's allegations in a direct manner. However, Bryan asked McDaniels several questions relating to them. App. 1019-21. Bryan asked whether McDaniels touched Federici's neck or face in the library. App. 1019. McDaniels responded that he had not, but might have, and recalled an incident in which Federici was sitting when he walked into the library and saw him. App. 917, 1019-20. Bryan asked whether McDaniels had stared at the lower part of Federici's body in the library, in the presence of another student. App. 1020. McDaniels denied this. App. 1020. Bryan also asked whether McDaniels had talked to Federici about "tough love." App. 854, 915, 1020. McDaniels said that Federici initiated that topic. App. 1020. Bryan testified that he also asked McDaniels about the sexually explicit remark quoted by Federici and about the alleged warning by McDaniels for Federici to keep quiet about their conversations. App. 854, 856. McDaniels, however, denied that Bryan ever mentioned these two points. Bryan also brought to McDaniels' attention his previous reprimand for sexual harassment, showing him the warning letter. App. 856, 1029. McDaniels told Bryan and McNicholas that the sexual harassment allegations regarding Federici were not true.

Bryan and McNicholas testified that Bryan told McDaniels that he should contact Bryan if he thought of any other matters, and that he had available various options to deal with these charges under his collective bargaining

agreement with the college, the college's sexual harassment policy, and the Pennsylvania Local Agency Law, including an appeal to the president of the college. App. 861-63, 915. McDaniels did not recall any of this. App. 1091.

As agreed, Bryan contacted Federici's parents. In particular Bryan had a telephone conversation with Federici's mother, who told him that she did not remember talking to McDaniels. App. 797. McNicholas met with Jackson and asked whether McDaniels had told him that Federici was "off the wall" or "crazy" and Jackson answered "no." App. 920.

Subsequently, Bryan sent McDaniels a letter, dated December 4, 1991, informing him that Bryan had investigated the matter and would recommend that the Board of Trustees terminate McDaniels' employment for sexual harassment. App. 804. The letter also advised McDaniels of his post-termination rights:

> As I mentioned during the pre-termination meeting last Wednesday, you may want to have the [Board of Trustees'] action heard through the grievance procedure as provided under the terms of the collective bargaining agreement or you may elect to have a hearing before a committee of the Board of Trustees.

App. 246 (testified to at app. 803-04). Bryan sent McDaniels another letter, dated December 9, 1991, which said briefly:

Consistent with procedures in Regulation 63.03, page 12 of the College Policy Manual, I am writing to inform you that you may exercise your right to request a further review and investigation by the President of the College or his designee on the matter of the sexual harassment complaint lodged against you. You have five (5) days to file this request.

Please phone me should you have any questions on this matter.

App. 248 (testified to at app. 804, 1045).

McDaniels wrote to the college's president, Richard D. DeCosmo, on December 12, 1991, to request that DeCosmo investigate the sexual harassment charges. App. 1051. McDaniels indicated in the letter that he had "formally filed a grievance with the intent of going all the way through the grievance procedure (arbitration) & beyond to civil action to avoid termination." App. 165, 2352-53 (testified to at 1052-53). McDaniels testified, however, that at the time of the letter, he had not begun the grievance procedure but was only "looking into" it. App. 1093-94. McDaniels also wrote:

Enclosed is a chronologized transcript of my total contact with this student. I emplor (sic) you to thoroughly investigate his alligations (sic) personally & overturn the termination

decision. . . .

. . . I would be most happy to visit you & go over cronology (sic) of contact with John Federici from first meeting to last confrontation spanning May 23, 1991 to October 22, 1991. Every single meeting was for class business only.

After receiving this letter, DeCosmo reviewed the documents relating to this matter, and met with Bryan, McNicholas, and Jackson to review their investigations and findings. App. 1126. On December 18, 1991, DeCosmo wrote the following to McDaniels:

I am satisfied that there has been a thorough review of the matter in question. I do not believe further review is necessary. The recommendation to terminate your employment for violation of the College's sexual harassment policy will be presented to the Board of Trustees at their meeting on December 18.

App. 250 (testified to at app. 1102).

At the Board of Trustees' meeting on December 18, 1991, the Board voted unanimously to terminate McDaniels' employment. McDaniels did not appeal to or ask for a hearing by the Board of Trustees. Nor has he pursued the matter in state court. Instead, he began arbitration procedures as provided for by the collective bargaining agreement. Before the parties completed selection of the arbitrators, however, McDaniels filed

this action. Consequently, the arbitration proceedings have been stayed pending its disposition.

III. JURISDICTION

The district court had jurisdiction over this civil rights action pursuant to 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1343 (civil rights). We have jurisdiction under 28 U.S.C. Section 1291 over the final orders entered by the district court.

IV. DISCUSSION

A. Judgment as a Matter of Law

The college made a motion for judgment as a matter of law based on Fed. R. Civ. P. 50(a) at the close of McDaniels' case in the first phase, which was also at the close of all the evidence, and a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) after completion of all three phases. The district court denied both motions, and the college appeals from both denials.

We exercise plenary review over the district court's denial of the college's motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) and 50(b). Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993), sets forth the standard we follow when considering a defendant's motion for judgment as a matter of law:

> Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version.

Id. (citations omitted). A review of the record leads us to conclude that the jury verdict to the extent unfavorable to the college at the first phase is not supported by legally sufficient evidence and that the college should have been granted a judgment as a matter of law.

The parties agree that the starting point of the resolution of this procedural due process dispute is Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). In Loudermill, two discharged school district employees sued their former employers for deprivation of liberty and property interests without due process in the pretermination procedures. The Supreme Court held that the district court erred in dismissing the complaints. The Court first confirmed that under applicable Ohio law, the plaintiffs had property rights in continued employment. Id. at 538-39, 105 S. Ct. at 1491. Then, in determining "what process is due," Morrissey v.

Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972), the Loudermill Court began with the long-standing precept that "an essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Loudermill, 470 U.S. at 542, 105 S. Ct. at 1493 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656-57, 94 L. Ed. 865 (1950)). The Court reiterated the settled rule that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Id. (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 599, 92 S. Ct. 2694, 2698, 33 L. Ed. 2d 570 (1972)). The Court noted that one essential component of due process, was a pretermination opportunity to respond. Id.

Having said that, the Court went on to point out that "the pretermination 'hearing,' though necessary, need not be elaborate." Id. at 545, 105 S. Ct. at 1495. Rather, "'the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.'" Id. (quoting Boddie v. Connecticut, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971)). Thus, after balancing the

interests of public employees and employers, the Court held that "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546, 105 S. Ct. at 1495. The Court concluded that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statutes." Id. at 547-48, 105 S. Ct. at 1496.

The parties agree that under Loudermill McDaniels had a constitutionally protectible property interest in continued employment as a tenured professor at the college. Loudermill therefore provides the guidelines for "what process is due." Morrissey v. Brewer, 408 U.S. at 481, 92 S. Ct. at 2600. The question then is whether the college satisfied its obligations under these guidelines.

After the closing of the first phase of the trial, the district court charged the jury in relevant part:

> Being a tenured professor at a community college he was a public employee with a property interest in his job. The law is that such an employee is entitled to the notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. And

this entire process is known as a pre-termination hearing.

The notice may be written or oral, that is spoken. It need not be advance notice, that is a pre-hearing notification. In other words, the notice of the charges may be given at the hearing itself. The hearing can be informal . . . . It is not required to be a full hearing before the final decision maker.

. . .

The employee need not be informed as to all of the evidence, but at least the substance of it. He must be given the opportunity to respond to the charges, and for that opportunity to be meaningful he must know the substance of the case that the employer has against him. This enables the employee to make any plausible arrangements that might prevent the termination. . . .

In deciding whether Mr. McDaniels was given the opportunity to respond, you may consider what you decide occurred at the meeting on November 27, 1991, and also what occurred thereafter, prior to his termination on December 18th. If you decide that under all the circumstances that Mr. McDaniels was substantially unable to respond, either at the meeting or before December 18, and that his inability to do so was caused by the conduct of the college's

representatives, then it could not be said that he had the opportunity to respond to the charges.

App. 1200-03. The jury found that the college, through Bryan, did notify McDaniels "that the meeting on November 27, 1991 was a pre-termination hearing based on the sexual harassment charges of John Federici;" at that meeting Bryan did inform McDaniels as to the substance of the case against him; but McDaniels was not given a meaningful opportunity to respond and tell his side of the story. App. 1214-15.

On appeal, the college does not quarrel with the foregoing charge. But McDaniels appears to argue that, as a tenured professor who had been teaching at the college for 20 years, he deserved more protection than those set forth in Loudermill. We disagree. The Loudermill Court balanced the competing interests of the employer and the employee in deriving the pretermination requirements. In determining whether the Loudermill standard should apply here, we must consider the interests of McDaniels versus those of the college and the students.

It is true that McDaniels has a property interest in his continued employment and perhaps a liberty interest in clearing his reputation of sexual harassment charges. But McDaniels appears to argue that because he is a professor and has been at the college for 20 years, his property interest in continued

employment is constitutionally greater than those held by the employees in Loudermill. Yet he has not offered any basis on which we could or should distinguish reasonably between the interest of a tenured employee who has worked 20 years and the interest of one who has worked only one year for the same employer and we can conceive of no principled way to distinguish between the two. Arguably, the interest in continued employment may be greater for younger employees who have started only recently because they have potentially more years of employment ahead.

McDaniels claims that "unlike ordinary public employees, the rights of professors to teach, free from arbitrary discharge by administrators, implicates the societal value of academic freedom. Tenure is the pillar upon which academic freedom rests." Br. at 34. Although this assertion may be true, it is not material in this case. Inasmuch as the college did not discharge McDaniels in retaliation for his exercise of First Amendment rights, this case does not implicate free speech issues. Indeed, in his complaint McDaniels does not refer to the First Amendment. Rather, we are concerned with the minimum process due under the Constitution to protect property rights in public employment.

McDaniels also cites Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142, 152 (3d Cir.), cert. denied, 459 U.S. 1048, 103 S. Ct. 468, 74 L. Ed. 2d 617 (1982), for the

proposition that college professors deserve more process than the run-of-the-mill, Loudermill -type employee. In Skehan, we adhered to our earlier decision in Chung v. Park, 514 F.2d 382 (3d Cir.), cert. denied, 423 U.S. 948, 96 S. Ct. 364, 46 L. Ed. 2d 282 (1975), where we stated that pretermination safeguards due to tenured professors

> may include : (1) written notice of the grounds for termination; (2) disclosure of the evidence supporting termination; (3) the right to confront and cross-examine adverse witnesses; (4) an opportunity to be heard in person and to present witnesses and documentary evidence; (5) a neutral and detached hearing body; and (6) a written statement by the fact finders as to the evidence relied upon.

Chung, 514 F.2d at 386 (emphasis added). Nevertheless, neither Skehan nor Chung announced that due process required all six of these steps in cases involving tenured professors. In both cases, we did not reach that issue because the colleges provided all six. And neither case based the listed due process safeguards on the distinguishing fact that the employees were professors and therefore were entitled to extra protection in the name of academic freedom. In any event, both cases were decided before Loudermill. Inasmuch as Loudermill sets the minimum due process pretermination requirements where state procedure also provides, as it does here, substantial

post-termination safeguards, Loudermill defines the minimum due process requirements for this case. We further note that in Skehan we did not even consider the post-termination remedies, if any, as later required by Loudermill. And in Chung, although certain post-termination remedies were available, see 514 F.2d at 385 n.3., we did not consider them in reaching our result. In fact, we held that some of the six enumerated steps may be provided after termination, and decided that the professor was not entitled to a hearing prior to termination. Id. at 387.

In considering the interests of the college, we note that it, as much as a professor, has a great interest in preserving its reputation. Moreover, the college had adopted a policy of protecting its students from the types of behavior charged against McDaniels. We also need to consider the interests of the alleged victim of the sexual harassment. If the charges are well founded, the complainant should be protected against possible retaliation and threats.

In sum, we conclude that only the Loudermill pretermination requirements were required here. We therefore find that the trial court's instructions that due process required the college to provide McDaniels with notice and explanation of the charges and an opportunity to respond were correct. See, e.g., Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1077-78 (3d Cir. 1990)

(suspension without pay also requires prior notice and hearing); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1144-46 (3d Cir. 1988) (suspension complied with due process where interview was held which notified employee of charges, allowed him to explain, and notified him of suspension), cert. denied, 490 U.S. 1004, 109 S. Ct. 1636, 104 L. Ed. 2d 153 (1989); Gniotek v. City of Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986) (no advance notice of the pretermination hearing is required; "Notice is sufficient, (1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and (2) if it is timely under the particular circumstances of the case."), cert. denied, 481 U.S. 1050, 107 S. Ct. 2183, 95 L. Ed. 2d 839 (1987).

The college argues that McDaniels was given notice of the hearing and the charges against him, an adequate explanation of its evidence, and an adequate opportunity to present his side of the story. The college points out that McDaniels had various post-termination remedies, including a hearing before the Board of Trustees, arbitration, and an appeal to the state court. Finally, the college argues that the verdict should be overturned because the jury's finding that McDaniels did not have a meaningful opportunity to respond cannot be squared with evidence indisputably showing that McDaniels in fact did respond to the charges.

We agree with the college that, in

light of the undisputed evidence regarding the timing of the relevant events, the jury's conclusion that he was not given a meaningful opportunity to respond and to tell his side of the case cannot stand. McDaniels received adequate notice of the nature of the November 27, 1991 meeting, and an explanation of the substance of the case against him. Given this background, the time between his November 27 meeting with Bryan and McNicholas and the December 18 Board meeting was adequate as a matter of law for him to make an appropriate pretermination response. Indeed, not only did Bryan and McNicholas ask for and receive McDaniels' responses during the November 27 meeting, but the correspondence shows that he was encouraged to respond further and did so. In fact, Bryan's December 9, 1991 letter informed McDaniels that he could request a review prior to termination by the president of the college. DeCosmo's actions in reading and answering McDaniels' letter showed that the college did not refuse him an opportunity to respond.[5] Finally, the facts that McDaniels did respond to the charges during the pretermination meeting by essentially denying them and attributing the charges to Federici's emotional

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[5] Of course, the fact that they did not accept his responses is irrelevant for purposes of determining whether his procedural due process rights were offended.

problems, and by writing to DeCosmo after the meeting, conclusively established that, contrary to the verdict, the college gave him a meaningful opportunity to respond and to tell his side of the story before termination. Thus, if the jury's findings as to the first two questions are upheld, its third finding cannot stand.

In response to the college's arguments, McDaniels maintains that he did not receive timely and adequate notice, an adequate explanation of the specific allegations, or a meaningful opportunity to respond, though he does not ask that the verdicts adverse to him on the first two issues be set aside. McDaniels contends that the notice given him was insufficient because it was not provided until the beginning of the pretermination meeting. We have held, however, that "advance notice is not required." Gniotek, 808 F.2d at 244. In Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1142-46, we held that procedural due process was met where a policeman was told that he had tested positive for illegal drug use, was allowed to respond, and was told that he would be suspended with intent to dismiss, all in the course of a single interview.

Second, McDaniels contends that he did not receive adequate notice and explanation of the charges against him because he was not told or given the exact allegations made by Federici. In this regard, it is not disputed that the

written summary of Federici's allegations was not given or read to McDaniels before his termination. We have held, however, that pretermination notice of the charges and evidence against an employee need not be in great detail as long as it allows the employee "the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges." Gniotek, 808 F.2d at 244; see also Derstein v. Kansas, 915 F.2d 1410, 1413 (10th Cir. 1990) (fact that employee did not know of all relevant facts and was not given copy of investigation transcript is insignificant), cert. denied, 499 U.S. 937, 111 S. Ct. 1391, 113 L. Ed. 2d 447 (1991). Nor is it disputed that Bryan asked McDaniels specific questions about Federici's allegations and that McDaniels replied to the questions. The only dispute, then, is whether this session put McDaniels on sufficient notice of the charges against him so he could respond meaningfully and on this point the verdict is unassailable.

Thus, given that, for the reasons we already have stated, McDaniels received adequate notice and a sufficient explanation of the charges against him, it must be concluded that he also was given an adequate opportunity to respond. McDaniels places great emphasis on his state of mind during the pretermination meeting. In essence, he argues that by not giving him prior notice of the reason for the meeting, he was placed into a state of shock and was unable to respond

when Bryan told him he was being charged with sexual harassment and might be terminated. Though we do not decide the point, this contention might have been reasonable if he had been dismissed at the end of meeting, which only lasted about an hour. See, e.g., Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991). But that was not the case here. Several weeks elapsed between the pretermination meeting and the Board of Trustees' meeting at which he was terminated. Bryan informed him that he could appeal to DeCosmo, which he did. We need not determine today what amount of time for "cooling off," if any, must be allowed for an employee to respond to charges because the facts show that McDaniels had ample time to collect himself.[6] Indeed, the record demonstrates that he consulted an attorney[7] and sent a written response

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[6] We are not holding that any delay beyond the pretermination hearing is required for a response. Thus, this case does not cast doubt on the general practice reflected in the cases of terminating an employee at the pretermination hearing. Our opinion simply reflects what happened here.

[7] McDaniels testified that he talked to his union's attorney after the pretermination meeting. App. 1095. In addition, his letter to Cosmo indicated that he was withholding copies of the letter from Federici "on advice of attorney." App. 2253.

to DeCosmo before the December 18 meeting.

Derstein v. Kansas, 915 F.2d 1410, supports our conclusion that the elapse of time between the November 27 and the December 18 meetings requires that judgment as a matter of law be entered in favor of the college. Indeed, Derstein is remarkably similar to this case on the facts. In that case the public employer received information that a tenured employee was sexually harassing other employees. As a result, he was directed to appear at a meeting with persons responsible for his employment. He was not informed of the purpose of the meeting before it started but at the meeting he was advised of the sexual harassment charges and given ten days to resign or be terminated. He also was told he could appeal. At the end of the ten days the employee was given a termination letter which described the appeal rights and which advised him of the charges against him. He appealed but the appeal board dismissed his appeal as frivolous. Following a bench trial, the district court found that the employee's pretermination rights had been violated and thus it entered judgment for him.

The court of appeals reversed. Of particular interest here, it emphasized that the employee "was not terminated at the meeting but given ten days to respond" and "he was given ten days

before termination." Id. at 1413. McDaniels had even more time to respond than the employee in Derstein and he did respond after the November 27 meeting.

Finally, McDaniels argues that the district court should have granted him judgment as a matter of law because the college's termination procedure violated Pennsylvania Local Agency Law. This argument flies in the face of both logic and law. His complaint charged that the college violated McDaniels federal constitutional rights to procedural due process. The question of whether an employee has a property right in continued employment is a question of state law. Board of Regents of State Colleges v. Roth, 408 U.S. at 577, 92 S. Ct. at 2709. But the determination of "'what process is due' . . . is not to be found in [state statutes]." Loudermill, 470 U.S. at 541, 105 S. Ct. at 1493 (citation omitted). Rather, it is a question of federal constitutional law. See Vitek v. Jones, 445 U.S. 480, 491, 100 S. Ct. 1254, 1263, 63 L. Ed. 2d 552 (1980) (minimum requirements of procedural due process are "a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate"). Purported violations of state law are not germane here.

In reaching our result we take note of Judge Aldisert's contentions in his dissent that the college denied McDaniels procedural due process of law. He predicates this contention on his

conclusions that the notice of the pretermination hearing was constitutionally inadequate and that McDaniels did not have an opportunity to prepare a meaningful defense to the charges. Judge Aldisert relies principally on Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987), in reaching his conclusions.

Our opinion to this point adequately responds to Judge Aldisert's contentions except that we have not mentioned Morton v. Beyer which we thus now address. In Morton v. Beyer at the pretermination hearing the employee was suspended without pay. 822 F.2d at 366. Thus, the proceedings at the hearing were critical because unless the employee's response then and there convinced the administrators not to take action, and it did not, the employee forthwith would suffer a serious adverse employment action. Here, unlike the plaintiff in Morton v. Beyer, McDaniels does not allege that he was suspended without pay at the pretermination hearing. Rather, his complaint is that the trustees unlawfully discharged him on December 18, 1991. Accordingly, McDaniels quite logically did not sue Bryan and McNicholas, he sued the trustees. Therefore, Morton v. Beyer is completely distinguishable from this case and it is not controlling here.

B. Preclusion from Showing that Pretermination Hearing was a Sham

McDaniels also argues that the

district court erred in refusing to allow him to show at trial that the pretermination procedure afforded him was a sham. Essentially, McDaniels' theory is that the college administrators never believed Federici's allegations to be true. Instead, he charges that they pounced on Federici's complaint to get rid of a highly paid professor to save money. The district court, relying in part on a recent case from the Court of Appeals for the Eleventh Circuit, McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (in banc), cert. denied, 115 S. Ct. 898 (1995), ruled that even if proven, the fact that the proceedings were a sham would be irrelevant to the claim that pretermination procedural due process was denied because the sufficiency of post-termination protection was not at issue. App. 1005-10.

Although due process requires an impartial decisionmaker before final deprivation of a property interest, Schweiker v. McClure, 456 U.S. 188, 195, 102 S. Ct. 1665, 1670, 72 L. Ed. 2d 1 (1982), it is not clear that strict impartiality is required at each stage of the process. In situations as the one at hand, there are two stages, pretermination and post-termination, but normally the post-termination proceedings conclusively determine the employee's status. The pretermination hearing merely serves as "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and

support the proposed action." Loudermill, 470 U.S. at 545-46, 105 S. Ct. at 1495 (citations omitted).

We have not decided the specific question of whether, in the employment termination context, an impartial decisionmaker is required at the pretermination hearing. In Rosa v. Resolution Trust Corp., 938 F.2d 383, 396-97 (3d. Cir.), cert. denied, 502 U.S. 981, 112 S. Ct. 582, 116 L. Ed. 2d 608 (1991), however, we touched upon a similar issue in another context. Rosa involved a pension plan of a bank placed under the conservatorship of the Resolution Trust Corporation (the "RTC"). At first, the RTC decided to continue the plan and assumed payment obligations. But after two contribution payments, the RTC decided to halt contributions and it sent out notices that the plan was to be terminated in two months. The beneficiaries of the plan sued. Under the Financial Institutions Reform and Recovery Enforcement Act, however, certain of the plaintiffs' claims for monetary relief had to be presented first to the RTC for review. The plaintiffs argued that this claims procedure violated due process because the RTC was biased as it had a financial interest in the determination of their claims. We held that the alleged bias did not violate due process because, after exhaustion of the RTC claims procedure, the plaintiffs would have the post-deprivation option of obtaining a de novo court evaluation of their claims. 938 F.2d at 397. Our holding in Rosa is

consistent with the approaches taken by other circuits in resolving this issue in the employment termination context.

In McKinney v. Pate, cited by the district court, a county official challenged the procedures of his termination, alleging that the Board of County Commissioners, who made the preliminary decision to terminate his employment, "was preordained to find against him, regardless of the evidence." McKinney, 20 F.3d at 1561. The court of appeals in banc, stated that "[a] demonstration that the decisionmaker was biased . . . is not tantamount to a demonstration that there has been a denial of procedural due process." McKinney, 20 F.3d at 1562. The court reasoned that the employee was entitled also to a post-termination hearing and would not be deprived of due process "unless and until the state refuses to provide due process." Id. The court held:

> In the case of an employment termination case, 'due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available "the means by which [the employee] can receive redress for the deprivations."' Schaper v. City of Huntsville, 813 F.2d 709, 715-16 (5th Cir. 1987) (quoting Parratt v. Taylor, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981)) (footnote omitted).

McKinney, 20 F.3d at 1562. Other courts of appeals have come to this same conclusion in cases where hearings are provided both before and after dismissal. See, e.g., Walker v. City of Berkeley, 951 F.2d 182, 184 (9th Cir. 1991) ("failure to provide an impartial decisionmaker at the pretermination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial"); Duchesne v. Williams, 849 F.2d 1004, 1005 (6th Cir. 1988) (in banc) (Loudermill does not require a "neutral and impartial decisionmaker" at the pretermination hearing but only "a right of reply before the official responsible for the discharge"), cert. denied, 489 U.S. 1081, 109 S. Ct. 1535, 103 L. Ed. 2d 840 (1989). Likewise, the Court of Appeals for the Fifth Circuit reached the same conclusion via an application of Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), and held that even if allegations of bias and conspiracy on the part of the decisionmaker were true, "the state cannot be expected to anticipate such unauthorized and corrupt conduct." Schaper v. City of Huntsville, 813 F.2d 709, 714-16 (5th Cir. 1987).

We find these cases convincing. First, as the Supreme Court has held, "the constitutional [procedural due process] violation actionable under ^U 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S.

113, 126, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). The Zinermon Court held that part of the process that the State may offer to avoid constitutional violations is a remedy for erroneous deprivations. Id. Thus, a discharged employee cannot claim in federal court that he has been denied due process because his pretermination hearing was held by a biased individual where he has not taken advantage of his right to a post-deprivation hearing before an impartial tribunal that can rectify any possible wrong committed by the initial decisionmaker.

We also find most persuasive the application of Parratt v. Taylor, 451 U.S. at 527, 101 S. Ct. 1908, to claims that pretermination decisionmakers were not impartial. In Parratt v. Taylor, a prisoner claimed violation of his procedural due process rights because the mail-ordered hobby kits for which he had paid disappeared after their delivery to his prison. The Supreme Court first recognized that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." Parratt v. Taylor, 451 U.S. at 539, 101 S. Ct. at 1915 (footnote omitted). The Court held that the prisoner failed to make out a procedural due process claim. The Court reasoned

that the nature of this deprivation, "a tortious loss [resulting from] a random and unauthorized act by a state employee," makes it difficult if not impossible for the State to hold a meaningful hearing before the deprivation. Id. at 541, 101 S. Ct. at 1916. The Court held that in such instances post-deprivation remedies such as tort laws are adequate.

This reasoning applies equally well in the employment termination context. Usually, an employment termination decision is made initially by the employee's direct supervisor or someone working in the same organization as the employee -- a sensible approach given that such person often is already familiar with the employee's abilities and shortcomings as well as the needs and interests of the employer organization. Yet, these individuals are also likely targets for claims of bias or improper motive simply because of their positions. For example, personality discord may lead to charges that a direct supervisor was biased. Or, as here, budget squeezes may lead to charges that the motivation for the dismissal was to trim the budget. While these charges may have merit in certain cases, to require that the state ensure an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge. Not only is this procedure unduly cumbersome, but it also

may be unreasonably invasive for the employee, who may want to keep the circumstances of his discharge private. On the whole, we do not think that such excessive pretermination precaution is necessary where the state provides a neutral tribunal at the post-termination stage that can resolve charges of improper motives.

Here, the parties agree that the college is a "local agency" subject to Pennsylvania Local Agency Law.[8] Under sections 752 and 754 of the Local Agency Law, 2 Pa. Cons. Stat. Ann. Sections 752 & 754 (Supp. 1994), McDaniels had the right to appeal the college's decision to the state court. See Monaghan v. Board of Sch. Directors of Reading Sch. Dist., 152 Pa. Commw. 348, 618 A.2d 1239, 1241 (Pa. Commw. Ct. 1992). Under section 754, a court may hold a de novo hearing "in the event a full and complete record of the proceedings before the local agency was not made." Moreover, the court may modify or set aside an agency decision if it finds violations of the employee's constitutional rights, an error of law, or that necessary findings of fact were not supported by substantial evidence. Id.; see also Coyle v. Middle Bucks Area Vocational Technical Sch., 654 A.2d 15,

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[8] Pennsylvania statute defines "local agency" as "[a] government agency other than a Commonwealth agency." 2 Pa. Ann. Stat. Ann. ^U 101 (Supp. 1994).

16 (Pa. Commw. Ct. 1994); Springfield Sch. Dist. v. Shellem, 16 Pa. Commw. 306, 328 A.2d 535, 537-38 (Pa. Commw. Ct. 1974). Clearly then, even aside from McDaniels' options in his union contract, which procedures he in fact initiated, the state offered him sufficient process to protect his property rights.

C. Denial of New Trial on Non-Economic Damages

As we find that the college did not violate McDaniels' procedural due process rights, we need not reach the question raised on his cross-appeal as to whether the trial court erred in denying his motion for a new trial on non-economic damages.

D. Dismissal of Individual Defendants

In a memorandum opinion, the district court noted that it had dismissed, sua sponte and without objection, the case as to the individual defendants because they had nothing to do with the pretermination events leading to McDaniels' discharge. There has been some confusion as to the resolution of this issue because McDaniels states that he did not agree to the dismissal and an order of dismissal was not entered until June 28, 1994, which was several months after the dismissal at the aborted trial. When the case was retried, McDaniels' attorney brought up this point and the court adhered to its ruling. App. 703-04. In his cross-appeal, McDaniels challenges

this dismissal.

We exercise plenary review over the district court's dismissal of the individual defendants. Alnor Check Cashing v. Katz, 11 F.3d 27, 29 (3d Cir. 1993). We have some question as to whether the district court's reasoning was correct as the trustees actually terminated McDaniels' employment. However, in light of our conclusion that the college did not violate McDaniels' rights to procedural due process, we will affirm the dismissal of the individual defendants. Inasmuch as the pretermination procedures did not violate McDaniels' rights, the individual defendants could not be liable.

V. CONCLUSION

For the above reasons, we will reverse the order denying the college's post-trial motion for judgment as a matter of law and will affirm the trial court's dismissal of the case as to the individual defendants. We do not address the college's appeal from the order denying its motion made at the end of the McDaniels' case for a judgment as a matter of law as it is moot. In sum, the consequence of our opinion is that this litigation is terminated in the federal courts with judgments in favor of all the defendants.

DISSENTING OPINION

ALDISERT, Circuit Judge, Dissenting

Fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause. Here we must decide whether the pretermination procedures of Delaware County Community College comported with the requirements of due process. In my view they did not. I would affirm the judgment of the district court. Accordingly, I dissent.

Prior to termination, a public employee with a property interest in continued employment must be afforded "a pretermination opportunity to respond, coupled with post-termination administrative [or judicial] procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-48, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). To ensure that the pretermination hearing is a meaningful one, the employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546.

In this case, Professor McDaniels was not provided adequate notice of the subject or purpose of the November 27, 1991 meeting. He was told only that he should bring his current gradebook and that it related to "a student problem." App. Vol. II at 790-91, 868-70. To be sure, advance notice is not a per se requirement of due process. Gniotek v. City of Philadelphia, 808 F.2d 241, 244

(3d Cir. 1986). Rather, as the majority correctly noted, "notice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstances of the case." Id. at 244. Thus, although advance notice is not required, "'the timing and content of notice ... will depend on appropriate accommodation of the competing interests involved.'" Id. (quoting Goss v. Lopez, 419 U.S. 565, 579, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975)). I conclude that the "particular circumstances" in this case required some form of advance notice. See Morton v. Beyer, 822 F.2d 364, 369 (3d Cir. 1987).

In Morton v. Beyer, a corrections sergeant at a state prison was summoned to a pretermination hearing six months after the putative misconduct, in that case inmate abuse, although he was aware that an internal affairs investigation was initiated within a couple of days of the alleged incident. On the morning of the hearing, the public employee received "vague" notice that the upcoming hearing had something to do with "a general allegation of inmate abuse." 822 F.2d at 370. At the hearing itself, the employee was accompanied by his union representative and was provided a packet of materials containing the various investigative reports of the incident for his review and comment, to which the employee declined to respond at the advice of his representative. We concluded: "On the undisputed facts of this case, [the employee] was not

afforded timely notice of the nature of the charges or the general evidence against him." Id. at 371.

This case assumes a fortiori proportions. First, although Professor McDaniels also was summoned months after the alleged incident, he was never aware that he was being investigated at any time prior to the pretermination hearing. Second, McDaniels received notice more vague than that in Morton v. Beyer : He was told less than two hours before the meeting only that he should bring his current gradebook and that it related to "a student problem." App. Vol. II at 790-91, 868-70. He was not informed that the upcoming meeting was intended to serve as a pretermination hearing or that it related to a student complaint of sexual harassment. Amazingly, this lack of notice was in keeping with the college's policy that the more serious the alleged incident, the less notice and information is provided. App. Vol. II at 802-03. Third, unlike the public employee in Morton v. Beyer, McDaniels was not accompanied by a representative and was not afforded the opportunity to review the investigative report or evidence against him, specifically a three-page hand-written summary composed by Bryan and signed by the complaining student. Fourth, as part of the pretermination procedure the employee in Morton v. Beyer was provided a departmental hearing after the initial hearing, 822 F.2d at 367 n.1 & n.2, whereas Professor McDaniels, notwithstanding the availability of what the majority characterize as

"post-termination rights," was refused further pretermination review or investigation when, at the suggestion of Bryan, he filed a written request for this additional safeguard from the president of the college.

Although I am satisfied that McDaniels' pretermination hearing afforded him, to some degree, an impromptu opportunity to hear some of the college's evidence and present his side of the story, clearly he was unable to mount a defense equivalent to the studied and prepared presentation levelled against him:

> In affirming the conclusion of the district court that [McDaniels] likely received an inadequate Loudermill hearing, we emphasize that we simply hold that, on the facts of this case, prior notice of the nature of the charges against [McDaniels] was required. Particularly in light of the significant lapse in time between the alleged improper conduct and the hearing in [Bryan's] office, [McDaniels] should have been provided sufficient time, at the very least, to recount the facts in his own mind and thus to prepare himself to demonstrate to [Bryan and McNicholas] that reasonable grounds to believe that the charges were true did not exist.

Morton v. Beyer, 822 F.2d at 371 n. 11.

The majority and I seem to agree

that it is difficult to square the jury's finding that Professor McDaniels was afforded constitutionally adequate notice of the pretermination hearing and the charges against him with its finding that he was not afforded a constitutionally adequate opportunity to respond. With such an agreement is an implicit acknowledgement that notice and opportunity to be heard are inextricably bound.

Subsumed in the due process requirement of notice is the concept that the recipient will be afforded some opportunity to prepare a meaningful defense. In this case the fact that notice of the pretermination meeting was given, as found by the jury, was nevertheless insufficient to permit Professor McDaniels to defend against a serious charge of sexual harassment intentionally flung upon him out of the blue, as also found by the jury. Under my view of due process protection, notice of a meeting is meaningless unless the vulnerable party is permitted a realistic opportunity to mount a defense and respond accordingly.

To be sure, the jury found that Professor McDaniels received notice of the meeting. That is a question of fact which I will not disturb on review. As a matter of constitutional law, however, I believe that the notice failed to meet the constitutional requirements of procedural due process. That is a question for the court and not for the jury. Accordingly, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK McDANIELS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DELAWARE COUNTY COMMUNITY COLLEGE	:	
	:	
	:	
Defendants	:	NO. 92-0932

MEMORANDUM

Ludwig, J. November 18, 1994

After trial by jury, defendant Delaware County Community College moved for judgment and for a stay of relief. Fed.R.Civ.P. 50(b); 62(b),(c). Plaintiff moved "conditionally" for a new trial limited to damages. Fed.R.Civ.P. 50(b). On August 18, 1994 an order was entered denying both parties' motions. On October 27, 1994 the Court of Appeals also refused defendant's request for a stay.

This is a civil rights action, 42 U.S.C. Sections 1981, 1983, 1985(3), occasioned by the termination in December, 1991 of plaintiff Frank McDaniels as a tenured professor at defendant Delaware County Community College. According to the complaint, he

was discharged without a proper pretermination hearing, thereby violating his right to procedural due process and unconstitutionally depriving him of the property interest in his employment. In a trifurcated trial,[1] the jury returned the following verdicts: 1) plaintiff was not given an adequate opportunity to be heard before termination; 2) if such an opportunity had occurred, he would not have been terminated; and 3) he was not entitled to damages for emotional and reputational harm.[2]

I.

Initially, plaintiff contends that defendant is estopped from challenging

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[1] Much of this action's procedural history is set forth in McDaniels v. Flick, 92-0932, 1993 WL 171270 (May 20, 1993) (granting summary judgment on liability) and McDaniels v. Delaware County Community College, 92-0932, 1994 WL 136922 (April 14, 1994) (reconsidering summary judgment and ordering trial).

[2] After the jury found, in verdict 2, that plaintiff would not have been discharged, an order was entered reinstating his employment with back pay. The jury was advised of the order before it considered verdict 3. It returned a verdict of zero damages. An award of $1 for the constitutional violation was entered.

the outcome of the trial by reason of defense counsel's jury summation in the third and finial phase, on damages. According to plaintiff, what defendant's counsel argued to the jury amounted to a binding promise not to proceed further with the case if the jury were to offset its award of damages by the order of reinstatement and back pay of $134,081, plus counsel fees. Specifically, defendant's counsel told the jury:

> [Plaintiff] is being made whole by being reinstated, by being paid all of his back wages, by being paid his counsel fees ... It is time to make peace and I ask you to be moral and help us make peace.

N.T., 14-21, July 18, 1994.

Additionally, plaintiff maintains that defendant's offer to "make peace" was accepted in a letter sent by plaintiff's counsel a week before defendant's Rule 50(b) motion was filed. Plaintiff's reply memorandum in opposition to defendant's post-trial motion, exhibit E.

Judicial estoppel may preclude a party from making legal arguments or factual statements that contradict earlier representations on which the court relied. "It is a well-established rule, principle, or doctrine that during the course of litigation a party is not permitted to occupy or assume inconsistent and contradictory positions, and that the parties to litigation are

necessarily bound to the position they assume therein." Scarano v. Central R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953).[3] Estoppel prevents parties from "playing fast and loose with the courts" by assuming contradictory positions. Fleck, 981 F.2d at 121 (quoting Scarano, 203 F.2d at 513).

Here, even if defense counsel's statements are regarded as a promise not to pursue post-verdict relief or an appeal, judicial estoppel fails. Our Circuit has specifically observed that "[m]aking a statement about the intent to appeal a decision is not the same as taking a position on a legal matter." Kepner, 843 F.2d at 759-60. Moreover,

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[3] See, e.g., Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121-22 (3d Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993) (party estopped where bankruptcy court lifted automatic stay in reliance on representation); Lewandowski v. National R.R. Passenger Corp. (AMTRAK), 882 F.2d 815, 819 (3d Cir. 1989) (plaintiff estopped from grievance procedure after counsel "hammered home on the seriousness of the injury and [plaintiff's] permanent inability to return to work"); U.S. v. Kepner, 843 F.2d 755, 759-60 (3d Cir. 1988) (no estoppel where counsel did not assume clearly contradictory positions). See generally Wright and Miller, Federal Practice and Procedure Section 4477 (1981 & Supp. 1994).

counsel's jury argument was not a representation of defendant's position on the merits. What he argued to the jury was that plaintiff "to some extent" and "to a large extent" had been made whole- and that the jury could help the parties make peace. N.T. 14-17, 14-18, July 18, 1994. He did not suggest to the court or the jury that defendant would necessarily give up its legal position in return for a reduced award for emotional and reputational harm. Instead, he made clear that he disagreed with the jury's earlier verdicts on liability. N.T. 14-16, 14-17, July 18, 1994.[4] See Wright

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[4] Defendant's counsel stated:

> We who sit out here in the court know not by what device you concluded when you first concluded that [plaintiff] did not have an opportunity to respond . . . . We don't know by what device your second verdict was entered, when you were asked to decide whether he would have been terminated by officials, if he had a chance to explain himself . . . . We don't know whether your verdict was influenced by any personal bias, byany anger that you might have, by any dominance by any one or more persons on the jury and this mystery, to us, will go unsolved.

N.T. 14-17.

and Miller, supra, Section 4477 ("superficial inconsistency must not be allowed to obscure an underlying consistency"). Although the jury may have concluded that if it did not award damages, the case would be resolved, it is more likely that given plaintiff's reinstatement with back pay, it did not believe he was entitled to an additional award. Regardless, judicial estoppel is legally unwarranted.

II.

In its post-verdict motion, Fed.R.Civ.P. 50(b),[5] defendant asserts that, under the evidence, plaintiff was afforded a constitutional pretermination opportunity to respond to the charges against him.[6] At trial, plaintiff

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[5] Defendant did not order a transcript of the trial or show cause to be excused. Given that defect alone, "the post-trial motions must be dismissed for lack of prosection." Local Rule 20. However, in this instance, the denial of defendant's 50(b) motion was a ruling on the merits.

[6] "The undisputed facts, those which were heard by the jury, is [sic] that Frank McDaniels had, as a result of the November 27th hearing, an opportunity to respond regardless of his protestations. The fact is undisputed that he did respond, requesting some further investigation . . . ."

denied having been given "an opportunity to present his side of the story," Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 545, 105, S.Ct. 1487, 1495 84 L.Ed.2d 494 (1985). Instead, he contended, the opportunity he received did not occur in a "meaningful time and in a meaningful manner." Brock v. Roadway Express, Inc., 481 U.S. 252, 261, 264, 107 S.Ct. 1740, 1747, 1748, 95 L.Ed.2d 239 (1987) (internal quotations omitted) (procedure must "reliably protect against the risk of erroneous deprivation"). The charges against him were that he had made homosexual overtures and remarks to a student in his class and had been reprimanded the year before for similar violations of the college's policy against sexual harassment. Plaintiff offered evidence that the college's representatives had made up their minds that he should be terminated regardless of his explanation.[7] See Cremeans v. City of Roseville, 861 F.2d 878, 883 (6th Cir. 1988) (hearing must amount to "more than a sham"). Also see Fultz v. Davis, No. 90-6039 and 91-5058 (3d Cir. 1991)

Defendant's brief at 5.

[7] At trial, plaintiff testified that the charges were untrue and suggested that the student's accusations were a retaliation for the "incomplete" he received for the course when he did not turn in his term paper on time.

(unpublished) (pretermination process insufficient in part because hearing, under Loudermill, must be capable of invoking decision-maker's discretion).[8] The evidence presented the triable question whether the pretermination due process accorded plaintiff met Loudermill constitutional prerequisites.[9]

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[8] Edmundson v. Borough of Kenneth Square, 4 F.3d 186 (3d Cir. 1993) (pretermination hearing sufficient albeit mayor impatient with plaintiff's explanation), is distinguishable. In the present case, there was a material dispute as to what occurred at the pretermination hearing, and plaintiff claimed to be in a state of shock. Thereafter, the college president concededly refused to hear plaintiff's explanation, although under the college's guidelines plaintiff appears to have been entitled to that opportunity as well. Plaintiff was so notified by the college's human services director.

[9] The jury was instructed:

> So, to review the three questions that you have been asked to decide: the first is whether Mr.McDaniels was notified on November 27, 1991, of the proposed termination of his employment, second, whether he was informed of the substance of the case against him and, third, whether he was

Defendant also argues that the jury was improperly allowed to consider the issue of opportunity to be heard from plaintiff's subjective standpoint:

> The test is not whether the plaintiff was of the opinion that he did not personally feel that all of the responses which could have been made were made. Consequently, the jury should not have been permitted to determine whether the plaintiff did in fact meaningfully respond to the charges.

Defendant's brief at 2.

Plaintiff testified to being in a state of shock at the hearing when informed for the first time of the charges and, therefore, being unable to respond coherently. However, the jury instructions in this case did not focus on whether plaintiff subjectively believed he had been given an opportunity to be heard:

> In deciding whether Mr.McDaniels was given the opportunity to respond, you may consider what you decide occurred at the meeting on

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> given the opportunity to respond and give his side of the story.

N.T. at 8-9, June 23, 1994.

> November 27, 1991, and also what occurred thereafter, prior to his termination on December 18th.If you decide, under all the circumstances, that Mr. McDaniels was substantially unable to respond, either at the meeting or before December 18th, and that his inability to do so was caused by the conduct of the college's representatives, then it could not be said that he had the opportunity to respond to the charges. On the other hand, if you decide that Mr. McDaniels was afforded the opportunity to respond, the fact that the college representatives had decided by December 27, 1991 [sic], that there were reasonable grounds to believe that Mr.McDaniels had violated the college's sexual harassment policy and that they continued thereafter in that belief, that doesn't mean he was denied the opportunity to respond.

N.T. at 9, June 23, 1994.[10] This charge was repeated when the jury requested

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[10] Defense counsel did not object to this instruction. N.T. at 15. The date referred to in the transcript was clearly intended to be November 27 - when the pretermination hearing was held - not December 27.

further instructions. The jury was informed that the alleged inability on plaintiff's part to respond had to have been caused by the conduct of defendant in order to be legally significant. Plaintiff's subjective response or view were not by themselves dispositive. Nor did the determination by the college's representatives that there were reasonable grounds to terminate plaintiff exclude his being given an adequate opportunity to respond. The decision to hold a pretermination hearing usually presupposes that such grounds exist.

In cases cited by defendant the alleged inadequate opportunity to respond was attributable to plaintiff. For example, in Gniotek v. City of Philadelphia, 808 F.2d 241, 245-46 (3d Cir. 1986), the claim of insufficient opportunity to respond was rejected although plaintiffs had to choose between responding and exercising their privilege against self-incrimination. Similarly, in Crocker v. Fluvanna City Board of Public Welfare, 859 F.2d 14,17 (4th Cir. 1988), plaintiff's belief that the grievance procedure did not apply to her did not vitiate her opportunity to be heard. In neither of these instances was defendant responsible for the deprivation of plaintiff's right to an adequate hearing.

III.

Plaintiff moved for a new trial as to damages on the sole ground that defense counsel's summation was

prejudicial.[11] This "conditional" motion constituted plaintiff's fallback position in the event that defendant's Rule 50(b) motion was not judicially estopped. Plaintiff's conditional post-trial motion at 1.

According to plaintiff, the following statements to the jury were improper: Plaintiff was made whole by the order of reinstatement and back pay, and the jury could help the parties "make peace"; plaintiff could have limited damages via post-termination arbitration two and a half years earlier; the jury had "convicted" the college officials with "no right of appeal to any jury of their peers"; only if the college officials had acted maliciously should the jury award damages, plaintiff may have committed some of the acts for which he was terminated.

Plaintiff's post-trial motion para. 1a-c.

According to plaintiff, the following instruction, given in response to plaintiff's objection at the end of defense counsel's summation, was not curative:

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[11] Defendant objected to this motion, citing lack of timeliness under Fed.R.Civ.P. 59. However, the motion was filed on August 3, 1994, within the 10-day time limit. Fed.R.Civ.P. 6; 59 (calculation of time periods of 10 days or less).

> Members of the jury, attorneys in their closing arguments are permitted to make argument in a wide range of ways. As you've heard, they can quote from various authors, they can use picturesque language, they can make all kinds of appeals to the jury. It's fair to say at this point that you, as the jury, should not consider that you have done anything wrong in your deliberations or your verdicts or that Mr. McDaniels did anything wrong in bringing this lawsuit.

N.T. 14-24, 14-25, July 18, 1994.

Our Circuit has authorized the grant of a new trial where improper statements "so pervade the trial as to render the verdict a product of prejudice." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 206-07 (3d Cir. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993); Draper v. Airco, Inc., 580 F.2d 91, 96 (3d Cir. 1978). As formulated in those decisions, the "test is whether the improper assertions have made it 'reasonably probable' that the verdict was influenced by prejudicial statements." Fineman, 980 F.2d at 207 (quoting Draper, 580 F.2d at 95). Here, most of defense counsel's impugned statements were within the generous realm of closing argument, and it cannot be said that any impropriety was pervasive. Cf. Fineman, 980 F.2d at 206-11

(plaintiff's counsel attested to his own credibility and repeatedly accused defense counsel and defendants of lying); Draper, 580 F.2d at 95 (plaintiff's counsel inappropriately noted defendants' wealth, offered personal opinion, referred to facts not in evidence, and "without provocation or basis in fact ... [made] several prejudicial, vituperative and insulting-references to opposing counsel").

Given the volatile context of this case, defense counsel's statements do not require a new trial. Fineman, 980 F.2d at 207. Arguments regarding reinstatement and back pay, making peace, the possibility of an earlier resolution through arbitration and plaintiff's alleged harassment of his accuser were not materially prejudicial because they grew out of evidence that was before the jury and conceivably were relevant. The statement that the jury in verdicts 1 and 2 had "convicted" the college's officials with no right of appeal to a jury of peers was inappropriate - but questionably prejudicial to plaintiff. That the jury should award compensatory damages, in effect, only if defendant should be punished was incorrect and highly unjustified. However, this argument constituted only a small part of the entire summation, and the jury was fully instructed on compensatory

damages.[12] See Salas v. Wang, 846 F.2d 897 (3d Cir. 1988) (isolated improper remark does not support grant of new trial). For these reasons, plaintiff's motion for a new trial as to damages was denied.

/s/ Edmund V. Ludwig

Edmund V. Ludwig, J.

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[12] Plaintiff's motion does not include this particular defense jury argument in specifying three statements assertedly not covered by the curative instruction. Plaintiff's post-trial motion, Para. 2a-c.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK McDANIELS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DELAWARE COUNTY COMMUNITY COLLEGE	:	
	:	
	:	
Defendants	:	NO. 92-0932

ORDER

AND NOW, this 19th day of August, 1994, the following motions are denied:

-Defendant Delaware County Community College's motion to stay the July 19, 1994 order of reinstatement and its motions for judgment pursuant to Rule 50 (b);

-Plaintiff Frank McDaniels' conditional post-trial motion.

Memorandum to follow.

/s/ Edmund V. Ludwig

Edmund V. Ludwig, J.

ENTERED: 8/22/94
CLERK OF COURT

No. 95-1011

Supreme Court, U.S.
FILED
1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

FRANK MCDANIELS,

Petitioner,

v.

JAMES R. FLICK; JOHN M. FITZPATRICK; FRANK C. HESS, JR.; JAMES P. GAFFNEY; JOSEPH W. GATTINELLA; NANCY J. GILOLEY; DEE M. GRANT; SHARON KREITZBERG; JAMES J. MCCANN; BARBARA W. MOSS; ALBERT T. OLENZAK; LUTHER H. SMITH; ROBERT E. WELSH; DELAWARE COUNTY COMMUNITY COLLEGE,

DELAWARE COUNTY COMMUNITY COLLEGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a public employee who has received notice of sexual harassment charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story prior to termination, and to whom the opportunity for full post-termination review is available, has been afforded pretermination procedures that comport with due process.

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COUNTER-STATEMENT OF THE CASE

This case presents a narrow issue regarding the pretermination procedural due process rights of a public employee. In August 1990, Delaware County Community College (the "College"), a public community college, issued a formal letter of reprimand to a tenured professor, Frank McDaniels, for his repeated violations of the College's sexual harassment policy. The letter of reprimand advised Mr. McDaniels that any further transgression would "result in serious disciplinary action including termination of employment."

In November 1991, yet another student complained that Mr. McDaniels had sexually harassed him on several occasions. The student, Mr. Federici, brought his complaint to James E. Bryan, the College's Director of Personnel Services. Mr. Bryan was familiar with Mr. McDaniels' history of sexual harassment. Mr. Federici described graphic incidents of sexual harassment, including both unwanted physical contact and sexually explicit and offensive remarks. Mr. Bryan composed a written summary of Mr. Federici's allegations, which Mr. Federici reviewed and signed. Mr. Bryan also investigated Mr. Federici's complaints independently. Following these events, Mr. Bryan scheduled a pretermination meeting for Mr. McDaniels. The circumstances surrounding that meeting form the crux of this case.

Mr. Bryan left a telephone message for Mr. McDaniels during the morning of November 27, 1991, requesting Mr. McDaniels to come to a meeting later that afternoon. Thomas McNicholas, Dean of Arts, Sciences and Commerce at the College, also was present at the meeting. The

first thing Mr. Bryan told Mr. McDaniels at the meeting was that "there had been serious charges of misconduct by a student and he was going to recommend [Mr. McDaniels'] termination." Mr. McDaniels understood from the beginning of the meeting that Mr. Bryan believed that Mr. McDaniels had violated the College's sexual harassment policy and that Mr. Bryan intended to recommend Mr. McDaniels' termination to the College's Board of Trustees. Mr. Bryan identified Mr. Federici as the complaining student during the meeting.

At the pretermination meeting, Mr. Bryan related specific details of Mr. Federici's allegations against Mr. McDaniels, including the allegations of physical contact and remarks concerning "tough love." Mr. Bryan expressly reminded Mr. McDaniels about the prior reprimand for violating the sexual harassment policy, showed him the signed warning letter, and informed him of his options for review of the termination decision under the College's collective bargaining agreement, the College's sexual harassment policy, and the Pennsylvania Local Agency Law. The meeting lasted approximately forty-five minutes.

Mr. McDaniels became upset upon learning that Mr. Federici was the complaining student, claiming that Mr. Federici was seeking retribution for an unsatisfactory grade Mr. McDaniels had given him. At some point during the meeting, Mr. McDaniels left the room to collect himself and then returned. Upon returning, Mr. McDaniels discussed the allegations raised by Mr. Bryan. Mr. McDaniels denied remembering that he had touched Mr. Federici, but admitted that he "could have." While he

admitted having discussed "tough love" with Mr. Federici, he denied harassing Mr. Federici. In his defense, he accused Mr. Federici of having "emotional problems," and urged Mr. Bryan and Dean McNicholas to discuss the allegations with Henry Jackson, an Assistant Dean at the College, who was Mr. McDaniels' supervisor and who was familiar with Mr. Federici's academic problems in Mr. McDaniels' course.

Following this pretermination meeting, and after further investigation by the College, Mr. Bryan wrote a letter to Mr. McDaniels, informing him that the College had completed its review of the matter and that Mr. Bryan had not altered his recommendation to terminate Mr. McDaniels' employment for violation of the College's sexual harassment policy. On December 9, 1991, Mr. Bryan again wrote to Mr. McDaniels, advising him that under the College's sexual harassment policy he had the right to request further review and investigation of the sexual harassment complaint by the College's President, Richard DeCosmo.

Mr. McDaniels took advantage of this additional opportunity to present his side of the story. On December 12, 1991, he wrote a letter to President DeCosmo, in which he denied the truth of the sexual harassment allegations and attempted to explain them, and requested further review and investigation. Mr. McDaniels stated in his letter that he had prepared a detailed chronology of all his contacts with Mr. Federici, which he was withholding "on advice of attorney." After receiving this letter, President DeCosmo met with Mr. Bryan regarding the substance of the allegations and the investigation. President DeCosmo then wrote to Mr. McDaniels on December

18, 1991, informing him that "I am satisfied that there has been a thorough review of the matter in question. I do not believe further review is necessary. The recommendation to terminate your employment for violation of the College's sexual harassment policy will be presented to the Board of Trustees at their meeting on December 18."

The recommendation to terminate Mr. McDaniels' employment was made to the Board on that date. The Board was informed that: (1) Mr. McDaniels had been charged with violating the College's sexual harassment policy by sexually harassing students in both 1990 and 1991; (2) the charges had been thoroughly investigated; (3) a pretermination hearing had been held; (4) Mr. McDaniels had been given an opportunity to respond; and (5) the College administrators still believed that Mr. McDaniels' employment should be terminated. Based on all this information, and after asking several questions of Mr. Bryan, Dean McNicholas, President DeCosmo, and the College's attorney, the Board voted unanimously to terminate Mr. McDaniels' employment at the College. Mr. McDaniels was informed of this action by letter dated December 20, 1991. Mr. McDaniels thereafter chose not to pursue his post-termination remedies, which included review under the College's collective bargaining agreement, the College's sexual harassment policy, and the Pennsylvania Local Agency Law.

Instead, Mr. McDaniels filed an action against the College and the individual members of the College's Board of Trustees in federal district court under 42 U.S.C. § 1983, alleging that the College's pretermination meeting violated his procedural due process rights under the United States Constitution. The district court granted Mr.

McDaniels' summary judgment motion as to liability and a jury trial commenced on damages. At the start of the trial, the district court dismissed the individual defendants and, after hearing Mr. McDaniels' testimony, reversed its grant of summary judgment on liability. The district court then declared a mistrial and scheduled a new trial on both liability and damages.

The second trial was divided into three phases. In the first phase, concerning liability, the jury returned a verdict that: (1) the College adequately notified Mr. McDaniels that the meeting held between himself and College officials on November 27, 1991, was a pretermination hearing based on sexual harassment charges brought by a student; (2) at the pretermination hearing, the College adequately informed Mr. McDaniels of the substance of the case against him; and (3) Mr. McDaniels was not given a meaningful opportunity to respond to the charges of sexual harassment. In the second phase of the trial, the jury determined that Mr. McDaniels would not have been terminated had he been given an adequate opportunity to respond and the district court then ordered that Mr. McDaniels be reinstated with back pay. In the third phase of the trial, the jury determined that Mr. McDaniels was not entitled to non-economic damages. The district court thereafter denied both parties' post-trial motions. Both parties appealed.

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court's order denying the College's post-trial motion for judgment as a matter of law and affirmed the district court's order dismissing the individual Board members. The court of appeals began its analysis with the seminal case with respect to

the pretermination procedural rights of public employees, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), in which this Court held that prior to termination, a tenured public employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

The court of appeals expressly rejected Mr. McDaniels' argument that he was entitled to more pretermination process than the public employees in *Loudermill* because he was a tenured professor who had been teaching at the College for more than twenty years and because " '[t]enure is the pillar upon which academic freedom rests.' " A. 26 (quoting McDaniels' Third Circuit Brief at 34).[1] The court saw no reason why the facts of Mr. McDaniels' tenure or length of employ would entitle him to heightened process. A. 25-26. Moreover, the court held that Mr. McDaniels' status as a college professor *qua* college professor did not entitle him to more protection because there was no allegation that the College had discharged Mr. McDaniels for his exercise of any First Amendment or other right involving academic freedom. Rather, he had been discharged for sexual harassment of students. Accordingly, the court held that "only the *Loudermill* pretermination requirements were required here." A. 28.

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[1] References to the Appendix in this Court are to "A." The court of appeals' opinion was lengthy and thorough. We focus here on those aspects of the opinion that are relevant to the issues raised in Mr. McDaniels' petition.

Applying the *Loudermill* standard to the facts of this case, the court of appeals held that as a matter of law, "in light of the undisputed evidence regarding the timing of the relevant events, the jury's conclusion that [Mr. McDaniels] was not given a meaningful opportunity to respond and tell his side of the case cannot stand." A. 29-30. The court found compelling the undisputed facts that Mr. McDaniels did, in fact, respond at the November 27 pretermination hearing; that he had the opportunity further to respond between November 27 and his termination on December 18; and that he did, in fact, so further respond. A. 30-31.

The court further rejected Mr. McDaniels' argument that the district court erred in refusing to allow him to show at trial that the pretermination procedure afforded him was a "sham." The court reasoned that because there are two stages in the termination process at which procedural protections attach – pretermination and post-termination – and because, under this Court's decision in *Loudermill*, the pretermination hearing is meant only as "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," *Loudermill*, 470 U.S. at 545-46, a public employee is not entitled to an impartial decisionmaker at the pretermination stage as a matter of constitutional right. A. 36-41. In addition, the court of appeals found "most persuasive" the application of *Parratt v. Taylor*, 451 U.S. 527 (1981), to claims that pretermination decisionmakers are biased. A. 41. According to the court, where, as here, the state "provides a neutral tribunal at the post-termination stage that can resolve

charges of improper motives," assurance of an impartial decisionmaker at the pretermination stage as a matter of constitutional right would be unduly cumbersome and unnecessary. A. 43. In view of its holding that the College did not violate Mr. McDaniels' procedural due process rights, the court of appeals affirmed the district court's dismissal of the individual defendants and did not reach the issue of the district court's denial of Mr. McDaniels' motion for a new trial on non-economic damages.

The dissenting judge would have held that Mr. McDaniels was not provided constitutionally adequate notice of the November 27 pretermination meeting and, accordingly, that he did not have an adequate opportunity to respond and the College's pretermination procedure violated due process. A. 46-50.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

Mr. McDaniels' petition essentially asks this Court to expand dramatically the pretermination procedural due process rights of public employees that it established over a decade ago in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). What Mr. McDaniels seeks would completely eviscerate *Loudermill* itself.

Rule 10 of the Supreme Court Rules sets forth the considerations indicating the character of the "special and important reasons" that support this Court's grant of a petition for a writ of certiorari. As relevant here, those

reasons include when a United States court of appeals has "rendered a decision in conflict with the decision of another United States court of appeals on the same matter;" or "decided an important question of federal law which has not been, but should be, settled by this Court;" or "decided a federal question in a way that conflicts with applicable decisions of this Court." But Mr. McDaniels' petition presents absolutely no reason – much less a special or important reason – why this Court should grant it.

The court of appeals' decision concerns a question of federal law that was settled by this Court in *Loudermill*, in which the Court set forth the test governing the pretermination procedural due process rights of public employees. The *Loudermill* test has been uniformly applied since then and its effectiveness has been well-proven over time.

Far from showing that the court of appeals' decision conflicts with any decision of this Court or any other court, the petition essentially demonstrates only Mr. McDaniels' dissatisfaction with the application of established precedent to the facts of his case and his desire that the law was something other than it so clearly is. Of course, that a particular litigant may not like the result in a particular case is hardly a reason for granting a petition for a writ of certiorari, especially where, as here, that result accords with both the precedent of this Court and the decisions of other courts of appeals. This Court

should reject Mr. McDaniels' argument that he was entitled to far more pretermination protections than this Court ever contemplated in *Loudermill* (or that courts applying *Loudermill* have extended) – protections that would fundamentally undermine, if not directly overrule, *Loudermill* itself.

I. THE ISSUES PRESENTED BY THE PETITION WERE SETTLED OVER A DECADE AGO BY THIS COURT IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*.

This Court established the contours of a public employee's right to a pretermination hearing in the seminal case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, the State of Ohio dismissed a security guard for dishonesty in filling out his job application. The employee filed an action in federal district court alleging that the Ohio statute, which provided that state employees could obtain administrative review only after the discharge occurred, was unconstitutional because it did not provide the employee an opportunity to respond to the charges against him prior to removal. *Loudermill*, 470 U.S. at 536.

The Supreme Court held that under the Fourteenth Amendment, a public employee with a property interest in his or her job is entitled to "some form of pretermination hearing." *Loudermill*, 470 U.S. at 542. The Court described the elements of "some form of pretermination hearing" as follows: "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's]

side of the story." *Id.* at 546. As this Court explained, "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by [state law]." *Id.* at 547-48. In the Court's view, "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

Balancing the interest of a public employee in retaining his employment with the competing governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of erroneous termination, the Court emphasized that the pretermination hearing may be informal, especially if the state provides the employee with the right to a full evidentiary hearing after termination. As the Court explained, "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46.

This Court's decision in *Loudermill* has been followed consistently and applied uniformly by the courts of appeals. *See, e.g., Collins v. Marina-Martinez,* 894 F.2d 474 (1st Cir. 1990); *Acosta-Spulveda v. Hernandez-Percell,* 889 F.2d 9 (1st Cir. 1989); *Strong v. Board of Educ.,* 902 F.2d 208 (2d Cir.), *cert. denied,* 498 U.S. 897 (1990); *Garraghty v. Jordan,* 830 F.2d 1295 (4th Cir. 1987); *Dorlak v. Bobear,* 814 F.2d 1055 (5th Cir. 1987); *Blank v. Peers,* 1993 U.S. App. LEXIS 8038 (6th Cir. April 7, 1993); *Guarino v. Brookfield*

Twp. Trustees, 980 F.2d 399 (6th Cir. 1992); *Jones v. City of Gary*, 57 F.3d 1435 (7th Cir. 1995); *Cliff v. Board of School Comm'rs*, 42 F.3d 403 (7th Cir. 1994); *Simons v. City of Grand Forks*, 985 F.2d 981 (8th Cir. 1993); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992); *Derstein v. Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994); *Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987). In fact, the College has found no case involving the pretermination procedural rights of public employees that has *not* applied the *Loudermill* standard. Yet, essentially, that is what Mr. McDaniels seeks.

As we next discuss, this petition should be denied because the court of appeals' decision is entirely consistent with *Loudermill* and its progeny. First, the court of appeals correctly applied *Loudermill* to the facts of this case. And second, Mr. McDaniels' attempts to convince this Court that he is entitled to more pretermination process than *Loudermill* provides present no special or important reasons for granting the writ and should be rejected.

II. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LOUDERMILL*.

As it was required to do under *Loudermill*, the court of appeals carefully weighed the competing interests presented in the case: on the one hand, Mr. McDaniels' property interest in his continued employment and his interest in preserving his reputation and, on the other

hand, the College's interest in its reputation and in protecting its students by terminating an employee who repeatedly was accused of sexually harassing his students. Essentially, Mr. McDaniels complains about how the court of appeals applied *Loudermill* to the facts of his case. However, noting that the jury had found that Mr. McDaniels had been given both "adequate notice and a sufficient explanation of the charges against him," (A. 32), the court reasoned (and the dissenting judge agreed) that the findings of notice were so intertwined with the opportunity to respond that the jury's conclusion that Mr. McDaniels had not had an adequate opportunity to respond was logically inconsistent. A. 32.

The court of appeals also emphasized that, in addition to the meaningful opportunity to respond provided at the pretermination hearing itself (at which Mr. McDaniels did, in fact, respond), the College also provided Mr. McDaniels with an additional period of nearly two weeks to respond further – during which Mr. McDaniels again responded. A. 33-34. According to the court of appeals, "the elapse of time between the November 27 and the December 18 meeting requires that judgment as a matter of law be entered in favor of the college." A. 34. The court also found persuasive the decision in *Derstein v. Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991), in which on remarkably similar facts the United States Court of Appeals for the Tenth Circuit found no procedural due process violation. Considering all these factors, the court of appeals correctly determined that Mr. McDaniels received all the pretermination procedural process he was due under *Loudermill*.

Moreover, in concluding that the evidence adduced at trial was insufficient as a matter of law to support the jury's finding that the College did not afford Mr. McDaniels a meaningful opportunity to tell his story, the court of appeals viewed the evidence in the light most favorable to Mr. McDaniels. It did not "usurp the jury function," as Mr. McDaniels asserts. McDaniels' Petition at 22. It merely applied the law as set forth in *Loudermill* to the facts as found by the jury, giving Mr. McDaniels the benefit of every doubt. *See* A. 8 & n.2. A district court does not "usurp the jury function" when it grants a post-trial motion for judgment as a matter of law and a court of appeals does not "usurp the jury function" when it reverses a district court's denial of such a post-trial motion.

In sum, the court of appeals correctly applied the legal standard set forth in *Loudermill* to the facts of this case, and there is no reason to grant the petition.

III. PETITIONER IS NOT ENTITLED TO MORE PRE-TERMINATION PROCESS THAN *LOUDERMILL* PROVIDES.

In derogation of *Loudermill*, Mr. McDaniels asserts that his procedural due process rights were violated in three respects: the "insulation" of the College's Board from the specifics of the case (see McDaniels' Petition at 14-16); the failure to give him, a tenured college professor, *more* process than the Supreme Court held in *Loudermill* is due to public employees prior to termination (see *id.* at 16-20); and the rejection of his "sham" pretermination hearing theory (see *id.* at 20-21). Essentially, Mr.

McDaniels seeks to engraft additional procedural requirements onto the *Loudermill* standard – requirements that are at odds with *Loudermill* itself.

Mr. McDaniels' arguments not only are devoid of merit, but also do not present any issue worthy of this Court's review. In fact, the import of the additional pretermination procedural protections that Mr. McDaniels seeks would, in effect, overrule *Loudermill* by transforming what this Court held the pretermination hearing *should* be – "an initial check against mistaken decisions" – into what this Court held it should *not* be – a full-blown inquiry into the propriety of the discharge. *See Loudermill*, 470 U.S. at 545-46.

A. That The College's Board Of Trustees Was The Entity Formally To Terminate Mr. McDaniels Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels asserts that "the Board terminated the Professor without any knowledge of the specifics of the charges against him or his side of the story" and argues that "[t]he complete insulation of the decision-making board from knowledge of the specifics of the charges or the professor's side of the story violates due process." McDaniels' Petition at 14.

While it is somewhat difficult to ascertain precisely what Mr. McDaniels would have had the Board know or do, as a factual matter Mr. McDaniels' assertion with regard to the role of the Board is, at best, misleading. The uncontroverted evidence at trial showed that the Board

was informed that: (1) Mr. McDaniels had been charged with violating the College's sexual harassment policy by sexually harassing students in both 1990 and 1991; (2) the charges had been thoroughly investigated; (3) a pretermination hearing had been held; (4) Mr. McDaniels had been given an opportunity to respond; and (5) the College administrators still believed that Mr. McDaniels' employment should be terminated. Based on all this information, and after asking several questions of Mr. Bryan, Dean McNicholas, President DeCosmo, and the College's attorney, the Board voted unanimously to terminate Mr. McDaniels' employment.

Moreover, as a legal matter, Mr. McDaniels' argument is devoid of merit. One need look no further than this Court's decision in *Loudermill* itself to understand why. As in this case, in *Loudermill* the defendant entity's board simply adopted – without any further investigation or independent knowledge or itself having heard the employee's side of the story – the recommendation of one of its administrators to terminate an employee. *Loudermill*, 470 U.S. at 535. Far from requiring that board members who technically effectuate the termination must personally investigate or have a personal understanding of the evidence, in *Loudermill* this Court held that due process is satisfied if prior to termination the employee has notice of the charges, an explanation of the evidence, and an opportunity to tell his or her side of the story. This Court expressly declined to require that an employer provide anything more because "to require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly

removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

Indeed, a constitutional requirement that college board members (or any other governing body of a public institution) have personal, independent knowledge of the evidence supporting a termination decision would have a profoundly deleterious effect on the administration of public institutions, to which delegation of responsibility is central. A college board cannot be expected – much less constitutionally required – to have personal, independent knowledge of the personnel decisions of the administrators to whom, of course, governing boards must entrust such decisions. Here, the Board legitimately relied on the recommendation of the College's administrators and, in fact, exceeded any duties it had by questioning the administrators and the College's counsel to make certain they had accorded Mr. McDaniels the pretermination procedures to which he was due.

The only decision of this Court that Mr. McDaniels cites, *Morgan v. United States*, 298 U.S. 468 (1938), is not at all instructive on the issues presented in this case. In *Morgan*, the hearing at issue was not a pretermination hearing prior to full post-termination procedures. Rather, it was a "full hearing" of a "quasi-judicial character" required to be held by the Secretary of Agriculture pursuant to statute. *Id.* at 479-481. In this context, where the ultimate decisionmaker acted essentially as a judge in an administrative proceeding that under the statute required "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings," the Court required the final decisionmaker to consider the

facts in the first instance. *Id.* at 480. The hearing at issue in *Morgan* was precisely what this Court in *Loudermill* held a pretermination hearing should not be – a full-blown inquiry into the merits of an action. Based as it is on entirely different principles, *Morgan* has no applicability here.

The only court of appeals' decision on which Mr. McDaniels relies in support of his "personal understanding of the evidence" argument is *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976). However, *Bates* neither supports his position nor demonstrates a conflict between circuits. In *Bates*, the United States Court of Appeals for the Sixth Circuit held that a tenured faculty member was *not* denied procedural due process. *Id.* at 333. Although the *Bates* court discussed the "personal understanding" requirement urged by Mr. McDaniels, it did not find that issue dispositive. *Id.* at 332. Rather, it held that the "crux" of the procedural due process issue was "not whether the due process hearing to which [the professor] may have been entitled was held in the presence of the authority having final responsibility to determine his discharge, but instead whether the hearing accorded him was meaningful." *Id.* Significantly, the *Bates* court also noted that the ultimate decisionmaker could delegate its responsibility to review the evidence supporting the termination recommendation. *Id.* at 332-33.

Furthermore, even assuming *arguendo* that Mr. McDaniels' reading of *Bates* were accurate (which it is not), the decision is of questionable import because *Bates* pre-dated *Loudermill*. To the extent that *Bates* could be read to suggest that pretermination procedures for public

employees include some level of "personal understanding" by the ultimate decisionmaker, that requirement is no longer valid in light of *Loudermill*. In fact, the United States Court of Appeals for the Sixth Circuit itself, which had issued the opinions that *Loudermill* affirmed, thereafter applied *Loudermill* without reference to its holding in *Bates*. *See Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (*en banc*) (no requirement that city council, the ultimate decisionmaker, have personal understanding where pretermination hearing was held by immediate supervisor), *cert. denied*, 489 U.S. 1081 (1989).

In short, there simply is no authority supporting Mr. McDaniels' argument that procedural due process requires that he is entitled to a hearing before the College's Board of Trustees or that the Board independently investigate or have a personal understanding of the evidence. Neither this Court's decision in *Loudermill* nor any other case imposes such a cumbersome procedural protection prior to termination.

B. Mr. McDaniels' Status As A Tenured College Professor Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels next attempts to enlarge this Court's decision in *Loudermill* by arguing that because he was a "twenty year veteran professor" with tenure and because of his resulting interest in academic freedom, he is entitled to more pretermination procedures than are other public employees. McDaniels' Petition at 16-20. The court of appeals rejected this argument, explaining that "[i]nasmuch as the college did not discharge McDaniels

in retaliation for his exercise of First Amendment rights, this case does not implicate free speech issues. . . . Rather, we are concerned with the minimum process due under the Constitution to protect property rights in public employment." A. 26. In addition, the court noted that "[i]n considering the interests of the college, we note that it, as much as a professor, has a great interest in preserving its reputation . . . [and] the college had adopted a policy of protecting its students from the types of behavior charged against McDaniels." A. 28.

As a threshold factual matter, the court of appeals correctly noted that neither the First Amendment nor academic freedom ever were issues in this case. To the contrary, as the court explained, Mr. McDaniels' theory was that the reason for his termination was pretextual because the College "pounced on Federici's complaint to get rid of a highly paid professor to save money" (A. 37), not that he was terminated in retaliation for exercising protected rights. Academic freedom is nothing but a red herring first advanced as an argument on appeal.

In addition, as a legal matter both this Court and the courts of appeals have recognized *Loudermill* as providing the controlling standard in cases such as this involving the pretermination due process rights of tenured college or university professors. In *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), Mr. Tarkanian, like Mr. McDaniels, was a tenured professor. The Court noted that when a state university "decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment." *Id.* at 192 (citing *Loudermill*). The Court's notation that *Loudermill* would provide

the standard by which procedural due process for a tenured professor would be judged refutes Mr. McDaniels' argument that as a tenured professor he is entitled to more procedural safeguards than *Loudermill* provides.

The courts of appeals similarly have concluded that *Loudermill* amply protects tenured teachers and, accordingly, in cases such as this have applied *Loudermill* as the standard for pretermination procedural due process rights. *See, e.g., Cliff v. Board of School Comm'rs*, 42 F.3d 403 (7th Cir. 1994) (tenured high school teacher with 28 years of service); *Blank v. Peers*, 1993 U.S. App. LEXIS 8038 (6th Cir. April 7, 1993) (tenured university professor with 22 years of service); *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992) (tenured high school teacher); *Strong v. Board of Educ.*, 902 F.2d 208 (2d Cir. 1990) (tenured elementary school teacher with 10 years of service), *cert. denied*, 498 U.S. 897 (1990); *Collins v. Marina-Martinez*, 894 F.2d 474 (1st Cir. 1990) (tenured university professor); *Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987) (tenured teacher and principal with more than 25 years of service).

The cases upon which Mr. McDaniels relies to support his assertion that he is entitled to heightened pretermination process are inapposite. In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the plaintiff was a public employer, not a public employee, and the due process right at issue was an employer's right to discharge an employee, not an employee's right to a pretermination hearing. Accordingly, to the extent the specific procedures set forth in *Brock* differ from those in *Loudermill*,

that difference is dictated by the fact that completely different interests were at stake in each case.

In *Holley v. Seminole County School Dist.*, 755 F.2d 1492 (11th Cir. 1985), the United States Court of Appeals for the Eleventh Circuit held that the two-day adversary hearing afforded a tenured teacher prior to nonrenewal of his contract did *not* violate due process. *Id.* at 1497. Without even a citation to *Loudermill* (which had been decided only days before it issued its opinion), the court of appeals determined that the hearing fulfilled all the requirements of the state statute governing teacher dismissals. No such statute is even at issue in this case. Moreover, when that court revisited the issue of the procedures required prior to termination of a tenured teacher, it applied *Loudermill* without imposing any additional procedural due process requirements. *See Hatcher v. Board of Public Educ.*, 809 F.2d 1546 (11th Cir. 1987).

In short, neither reason nor authority supports Mr. McDaniels' argument that his status as a tenured college professor entitles him to more pretermination process than *Loudermill* provides.

C. Mr. McDaniels' Allegation Of A "Sham" Pretermination Hearing Does Not Entitle Him To More Pretermination Process Than *Loudermill* Provides.

Mr. McDaniels' arguments that *Loudermill* requires an impartial decisionmaker at the pretermination stage and that he should have been permitted to show that the pretermination hearing was a "sham," McDaniels' Petition at 20-21, are simply further unfounded attempts to

expand the procedural protections established in *Loudermill*. Accordingly, consistent with the decisions of other courts of appeals to have addressed the issue, the court of appeals flatly rejected this argument. A. 36-44. *See McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995); *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991); *Acosta-Spulveda v. Hernandez-Percell*, 889 F.2d 9 (1st Cir. 1989); *Duchesne*, 849 F.2d 1004 (6th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989); *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987). Relying on *Loudermill*, these courts, like the court below, held that where an employer provides pretermination procedures pursuant to the dictates of *Loudermill*, due process does not also require an impartial pretermination decisionmaker because the procedural safeguard of an impartial post-termination decisionmaker satisfies due process. *See, e.g., McKinney*, 20 F.3d at 1562; *Walker*, 951 F.2d at 184.

This approach is the only one that does not eviscerate *Loudermill*. The impartial decisionmaker argument raised by Mr. McDaniels automatically would require more process than *Loudermill* has held is due to a public employee prior to termination. The mere raising of the argument would take the claim outside the realm of *Loudermill* and would require the sort of full evidentiary hearing that this Court specifically has held is inappropriate at the pretermination stage (as long as adequate post-termination procedures are available). Accordingly, to accept Mr. McDaniels' argument would render *Loudermill* meaningless.

Moreover, the court of appeals appropriately applied *Parratt v. Taylor*, 451 U.S. 527 (1981), to claims of bias at

the pretermination stage. In *Parratt*, a case arising in the prison context, this Court held that "random and unauthorized" acts by a state employee prior to a property deprivation do not give rise to a procedural due process violation as long as meaningful post-deprivation procedures are available. 451 U.S. at 539. The court of appeals reasoned that employment decisions often are made by the person's direct supervisor and thus particularly subject to charges of bias. Accordingly, "to require that the state ensure an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge." A. 42. In view of the significant post-termination remedies available to Mr. McDaniels, including an action in state court under state law and options under his union contract, *Parratt* provides further support for the court of appeals' decision. Indeed, other courts of appeals also have applied *Parratt* to claims of biased decisionmakers at the pretermination stage. *See, e.g., McKinney*, 20 F.3d at 1562-63; *Schaper*, 813 F.2d at 714-16.[2]

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[2] Mr. McDaniels' final effort to gain review in this Court is virtually an afterthought. Nothing supports his bald assertion that the court of appeals so far departed from the accepted and usual interpretation of due process before a property deprivation as to call for this Court's power of supervision to safeguard these rights. See McDaniels' Petition at 24-25. To the contrary, the court of appeals properly concluded that Mr. McDaniels was provided with all the process he was due under *Loudermill*. Mr. McDaniels' disagreement with that conclusion notwithstanding, his petition does not present any issue that requires review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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